FIRST DIVISION
January 9, 2017

No. 1-16-0743
2017 IL App (1st) 160743-U

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

IRONBEAM, INC., a Delaware corporation,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	
	)	No. 15 L 152
HOWARD J. STEIN,	)	
	)	Honorable Sanjay Tailor,
Defendant-Appellee.	)	Judge Presiding.
	)	

PRESIDING JUSTICE CONNORS delivered the judgment of the court.
Justices Harris and Simon concurred in the judgment.

ORDER

¶ 1 *Held:* Trial court abused its discretion in dismissing malpractice claim pursuant to Illinois Supreme Court Rule 103(b) where plaintiff showed reasonable diligence in serving defendant four months after filing of the complaint.

¶ 2 Plaintiff, Ironbeam, Inc., brought an action for legal malpractice against defendant, Howard J. Stein, alleging that defendant caused Ironbeam to be liable for compensatory damages totaling $496,696.48. Defendant moved to dismiss the case pursuant to Illinois Supreme Court Rule 103(b) (eff. July 1, 2007), arguing a lack of diligence on Ironbeam's part in serving

defendant. The trial court granted defendant's motion to dismiss, with prejudice, and denied Ironbeam's motion to reconsider. Ironbeam now appeals, contending that the trial court abused its discretion in dismissing its lawsuit with prejudice. For the following reasons, we reverse and remand this case for further proceedings.

¶ 3 BACKGROUND

¶ 4 On January 8, 2015, Ironbeam filed a one-count complaint against defendant, alleging that defendant was guilty of professional negligence in the course of his representation of Ironbeam. Ironbeam alleged that on January 31, 2012, defendant provided legal guidance in regards to the termination of "two Introducing Brokers of [Ironbeam] by terminating their agreements with Ironbeam immediately rather than providing thirty (30) days' notice pursuant to the agreements." Ironbeam further alleged that in February 2012, the two introducing brokers, Expo Futures and Options and Sonic Futures and Options, filed an arbitration claim in the National Futures Association against Ironbeam alleging, in part, breach of the introducing broker agreements, intentional interference with contractual relationship, and negligent interference with prospective economic advantage.

¶ 5 Ironbeam stated in its complaint that in December 2012, an arbitration hearing was held between the introducing brokers and Ironbeam, and that Ironbeam was found liable. Expo Futures and Options was awarded $200,356.20, and Sonic Futures and Options was awarded $296,340.28, for a total of $496,696.48. By agreement with the brokers' counsel, the award was reduced to a total of $450,564.94.

¶ 6 Ironbeam alleged that defendant owed a duty to Ironbeam to represent its interest, and that he was negligent in his representation because he failed to properly advise Ironbeam in regards to the termination of the introducing broker agreements, failed to advise Ironbeam to

provide the required 30 days' notice to terminate the agreements, negligently advised Ironbeam to request the introducing brokers to provide a security deposit, negligently provided advice that the agreements could be terminated with cause due to the introducing brokers' failure to provide a security deposit, negligently provided legal counsel at the arbitration, and was otherwise careless and negligent in his representation of Ironbeam regarding the termination of the brokers' agreement.

¶ 7 Ironbeam alleged that had defendant provided adequate legal guidance regarding the termination of the agreements and proper legal counsel, Ironbeam would not have had a judgment entered against it and would not have incurred monetary damages.

¶ 8 On July 14, 2015, defendant filed a motion to dismiss the complaint pursuant to Rule 103(b), arguing that because the claim arose out of the provision of legal services, Illinois law provides a two year statute of limitations that ran no later than January 10, 2015 (two years from January 11, 2013). Defendant alleged that he was not served with process until May 21, 2015, "more than 4 [months] after the case was filed." Defendant contended that he was not difficult to find since: (1) defendant provided Ironbeam with his address in January 2015, (2) Ironbeam could have easily located defendant, and (3) Ironbeam's officers were communicating with defendant on another matter on which defendant was representing an affiliate of Ironbeam at the time Ironbeam filed suit. Defendant argued that there were no efforts to serve him between January 13, 2015, and May 15, 2015, and that pursuant to Rule 103(b), Ironbeam did not use reasonable diligence to obtain service on defendant prior to the expiration of the statute of limitations.

¶ 9 In support of his motion, defendant stated that effective January 1, 2015, defendant was registered with the ARDC, disclosing his new business address, and that he provided Ironbeam

with his new address on January 20, 2015, via email. Defendant attached his own affidavit to the motion, in which he stated that on January 20, 2015, he emailed the chief financial officer (CFO) of Ironbeam, providing him with his new address. Defendant also attached a copy of the docket in the case, which indicated that summons to defendant was issued on January 8, 2015, to defendant, but was returned January 13, 2015. The docket states, "SUMMONS RETURNED – N.S. REASON: MOVED." The docket also indicated that Ironbeam filed a substitution of attorney on April 27, 2015.

¶ 10 Ironbeam filed a motion in opposition of defendant's motion to dismiss, stating that it sent the original summons to defendant's old address, but that the delay in sending the alias summons to his new address was inadvertent and not designed to circumvent the statute of limitations. Ironbeam stated that it did not possess actual knowledge of defendant's new address, despite the email to the CFO of Ironbeam, as there was no indication that Ironbeam's counsel received notice of the change of address. Ironbeam further alleged that while its previous counsel should have followed up with the summons, its failure to do so was inadvertent, and that its successor counsel issued the alias summons after substituting into the case on April 27, 2015. Ironbeam argued that its original counsel's failure to monitor service was merely an oversight.

¶ 11 The record contains an order entered on November 23, 2015, in which the trial court stated that defendant's motion to dismiss is granted "for reasons stated on the record and set forth below." Presumably, there was a hearing, but the transcript does not appear in the record. The reasons set forth in the order for the dismissal are listed as follows: the court found that (1) defendant established a lack of reasonable diligence by Ironbeam, based on the record showing the first attempt at service was returned within five days of service with an indication that defendant had moved, and with nothing further occurring to effectuate service until May 2015,

(2) Ironbeam failed to rebut the presumption of lack of diligence, (3) while the length of time to obtain service was on the shorter end of the spectrum, it is a factor the court considered as favoring the defendant, (4) the record was devoid of any evidence of any activity by Ironbeam after initial placement for service and subsequent attempt made in May 2015, (5) Ironbeam had knowledge of defendant's location because the new address was provided on January 20, 2015, and also defendant was easy to find, (6) there was no evidence that defendant had knowledge of the pendency of this case, (7) there were no special circumstances in the record affecting Ironbeam's efforts to obtain service, and (8) defendant was easily served once the proper address was used.

¶ 12 Ironbeam filed a motion to reconsider, which was denied. Ironbeam now appeals.

¶ 13 ANALYSIS

¶ 14 On appeal, Ironbeam contends that the trial court abused its discretion in dismissing its case with prejudice pursuant to Rule 103(b). Specifically, Ironbeam contends that there was no lack of diligence on its part in serving defendant, and that the record did not otherwise justify the harsh penalty of dismissal with prejudice. Defendant maintains that the trial court was well within its discretion in dismissing the case pursuant to Rule 103(b).

¶ 15 Rule 103(b) states the following:

> "(b) Dismissal for Lack of Diligence. 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 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 * * *." Ill. S. Ct. R. 103(b) (eff. July 1, 2007).

¶ 16 Our supreme court has noted that Rule 103(b) "does not state a specific time limitation within which a defendant must be served." *Segal v. Sacco*, 136 Ill. 2d 283(1990). "The rule 'has an essential purpose in promoting the expeditious handing of suits by giving trial courts wide discretion to dismiss when service is not effected with reasonable diligence.' " *Id*. (quoting *Karpiel v. LaSalle National Bank*, 119 Ill. App. 2d 157, 161 (1970)). "The plaintiff has the burden of showing reasonable diligence in service of process." *Id*.

¶ 17 "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." *Silverberg v. Haji*, 2015 IL App (1st) 141321, ¶ 31. " 'Statutes of limitations, like other statutes, must be construed in the light of their objectives. The basic policy of such statutes is to afford a defendant fair opportunity to investigate the circumstances upon which liability against him is predicated while the facts are still accessible.' " *Segal*, 136 Ill. 2d at 286 (quoting *Geneva Construction Co. v. Martin Transfer & Storage Co*., 4 Ill. 2d 273, 289-90 (1954)). Our supreme court has stated that, "[i]t has long been noted that '[p]revention of intentional delay in the service of summons which would postpone service for an indefinite time after a statutory period of limitations has run, was a primary reason for the passage of Supreme Court Rule 103(b) and its predecessors.' " *Id*., (quoting *Karpiel*, 119 Ill. App. 2d at 160).

¶ 18 "The public policy of Illinois favors determining controversies according to the substantive rights of the parties," and therefore "courts have held that Rule 103(b) is not to be used merely to clear a crowded docket." *McCormack v. Leons*, 261 Ill. App. 3d 293, 295 (1994). If a plaintiff made a reasonable effort to locate defendant during the months between filing the complaint and service of summons, a dismissal order would not be proper. *Id.*

¶ 19 Our supreme court set forth a list of factors for the court to consider when determining whether to allow or deny a Rule 103(b) motion to dismiss: (1) the length of time used to obtain service of process; (2) the activities of the plaintiff; (3) plaintiff's knowledge of defendant's location; (4) the ease with which defendant's whereabouts could have been ascertained; (5) defendant's actual knowledge of the pendency of the action; (6) special circumstances that would affect plaintiff's efforts; and (7) actual service on the defendant. *Segal*, 136 Ill. 2d at 287.

¶ 20 A trial court's ruling on a motion to dismiss pursuant to Rule 103(b) will not be disturbed absent a showing of an abuse of discretion, *i.e.*, where that ruling is " 'so arbitrary, fanciful, or unreasonable that no reasonable person would take the view it adopted.' " *Christian v. Lincoln Automotive Co.*, 403 Ill. App. 3d 1038, 1044 (2010) (quoting *People v. Lisle*, 376 Ill. App. 3d 67, 78 (2007)). "All factors must be considered in light of the purpose of Rule 103(b)." *Brezinski v. Vohra*, 258 Ill. App. 3d 702, 704 (1994).

¶ 21 In the case at bar, Ironbeam filed suit on January 8, 2015, and effectuated service upon defendant approximately four and a half months (19 weeks) later, on May 21, 2015. Both parties acknowledge that the original summons was sent to defendant's former address at the time the complaint was filed, but that it was returned on January 13, 2015. "An immediate attempt to obtain service has been held to evidence diligence on the part of the plaintiff." *Brezinski v. Vohra*, 258 Ill. App. 3d 702, 705 (1994). Here, an immediate attempt was certainly made.

¶ 22 A look at the seminal case on this issue is helpful. In *Segal*, the plaintiff filed a complaint on December 9, 1985. On April 24, 1986, the plaintiff filed a motion to have a special process serve appointed, and the defendants were subsequently served on April 29, 1986, and May 5, 1986. "Nineteen [19] weeks passed between the filing of plaintiff's complaint and placement of the complaint for service with the special process server." *Segal*, 136 Ill. 2d at 284. The defendants filed a motion to dismiss based on Rule 103(b). The plaintiff failed to appear at the hearing on the motion, and the trial court allowed the defendants' motion to dismiss with prejudice. *Id*. at 285.

¶ 23 On appeal, the appellate court reversed the circuit court's order, and the defendants filed a motion for leave to appeal to our supreme court, which was granted. Our supreme court found that an order of dismissal was not justified. It noted that "the reason given by plaintiff for failure to place the summonses for service for 19 weeks after the filing of his complaint was that plaintiff inadvertently forgot to do so. Upon realization of this, plaintiff moved for leave to have a special process server appointed, which was allowed by the circuit court on April 24, 1986." *Id*. at 286. Our supreme court further noted that "this cause arose in Cook County, where it is not uncommon for a trial not to occur until years after the filing of a complaint." *Id*. The court stated that the "inadvertent delay of 19 weeks" did not threaten the circuit court's ability to proceed expeditiously to a just resolution of the matter before it, and it did not continue long after the expiration of the statute of limitations. *Id*.

¶ 24 Our supreme court specifically found:

> "In this case, because the length of the delay in service of process was such that the purpose of Rule 103(b) would not be served by dismissing plaintiff's action, the allowance of defendants' Rule 103(b) motion by the circuit court was an abuse

> of discretion. It would not be an abuse of discretion for a circuit court to allow a dismissal with prejudice under Rule 103(b) for a delay equal to or shorter than the delay present in this case if the delay occurs under circumstances which serve to deny the defendants a fair opportunity to investigate the circumstances upon which liability against the defendants is predicated while the facts are accessible. [Citation.] Under such circumstances, the purpose of Rule 103(b), the protection of defendants from unnecessary delay and the prevention of the circumvention of the statue of limitations, would be promoted." *Id*. at 289.

¶ 25 We likewise reach the same conclusion. Under the circumstances of this particular case, we find that the trial court abused its discretion in dismissing the case based on Ironbeam's lack of diligence. There is no dispute that Ironbeam sent the original summons to defendant's former address at the same time the complaint was filed. While there was a subsequent delay in filing the alias summons, there is simply no indication that such delay was due to anything besides inadvertence on the part of Ironbeam. Ironbeam alleged in its response in opposition to defendant's motion to dismiss that the failure to serve defendant earlier was inadvertent and not designed to circumvent the statute of limitations. Ironbeam alleged that while its former counsel should have monitored the service, it did not, and a proper alias summons was executed immediately after new counsel was substituted into the case. Ironbeam also alleged that while an email was sent to Ironbeam's CFO indicating defendant's new address, there was no indication that Ironbeam's counsel knew of that new address. We agree with Ironbeam, and find that the trial court abused its discretion in dismissing the case pursuant to Rule 103(b).

¶ 26 To the extent that defendant relies upon *Wilder Chiropractic, Inc. v. State Farm Fire and Casualty Co.*, 2014 IL App (2d) 130781, we find that case to be distinguishable, and in any event

prefer to rely on our supreme court for precedent. In *Wilder*, the Second District held that there was a lack of reasonable diligence on the part of the plaintiff when the alias summons was not served on the defendant State Farm until 16 weeks after the complaint was filed. *Wilder*, 2014 IL App (2d) 130781, ¶ 81. The court noted that State Farm suggested that the plaintiff had the intent of keeping State Farm ignorant of an ongoing class action proceeding in Wisconsin state court until it was too late for State Farm to intervene. *Id*. According to State Farm, the plaintiff purposefully delayed service until after the trial court entered judgment in the Wisconsin action. Additionally, the court held that the plaintiff offered no justification in the trial court for the delay – but instead "engaged in a purely numerical comparison of the delay in this case with the delays in published cases addressing rule 103(b)." *Id*. at ¶ 83.

¶ 27 In the case at bar, there was no suggestion that Ironbeam purposefully delayed service in order to circumvent the statute of limitations, or for any other purpose. It offered a justification as well – a mistake of address, combined with a substitution of counsel – for its delay. We simply can find no reason upon which to base a finding that the delay served to deny defendant a fair opportunity to investigate the circumstances upon which liability against him was predicated while the facts were accessible.

¶ 28 CONCLUSION

¶ 29 For the foregoing reasons, we reverse the judgment of the circuit court of Cook County, and remand for further proceedings.

¶ 30 Reversed and remanded.