

No. 1-17-1747

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

DARREN TAYLOR,)	Appeal from the
)	Circuit Court of
)	Cook County
Plaintiff-Appellant,)	
)	
v.)	No. 16 M1 302006
)	
WAL-MART STORES, INC.,)	
)	Honorable
Defendant-Appellee,)	Catherine Schneider,
)	Judge Presiding.
(Pacific Cycle, Inc.)	
)	
Defendant).)	

PRESIDING JUSTICE REYES delivered the judgment of the court.
Justices Lampkin and Rochford concurred in the judgment.

ORDER

- ¶ 1 *Held:* Affirming the circuit court’s dismissal of plaintiff’s complaint with prejudice for failing to exercise reasonable diligence to obtain service on defendant where the record on appeal is insufficient to support plaintiff’s claims of error.
- ¶ 2 Plaintiff, Darren Taylor, filed suit against defendant, Wal-Mart Stores, Inc., for damages

arising from a September 23, 2014, accident involving a bicycle he purchased from defendant.¹ Plaintiff filed his complaint against defendant on September 21, 2016, and ultimately served defendant on March 13, 2017. Defendant then filed a motion to dismiss pursuant to Illinois Supreme Court Rule 103(b) (eff. July 1, 2007), claiming that plaintiff had failed to exercise reasonable diligence in obtaining service over it after the statute of limitations had expired. The circuit court granted the motion, dismissing the complaint with prejudice. Plaintiff now appeals, arguing that the circuit court abused its discretion when it granted defendant's motion. For the following reasons, we affirm.

¶ 3

BACKGROUND

¶ 4 On September 21, 2016, two days before the statute of limitations period was to expire, plaintiff filed a complaint against defendant alleging that on September 23, 2014, he suffered an injury when a wheel on the bicycle he had purchased from defendant fell off while he was riding it. While a summons from the clerk of the circuit court was issued the day the complaint was filed, the record does not indicate that the summons was ever returned.

¶ 5 On December 22, 2016, plaintiff attended a case status where a form "progress call order" was entered appointing Stern Processing as a process server and setting the matter on the "progress call" for March 17, 2017. The order further provided that March 17, 2017, would be "a final date for service of summons upon any as yet unserved defendant, at which time the case may be dismissed for want of prosecution as to such unserved defendant unless counsel appears with an affidavit showing diligence in attempting service."

¶ 6 Almost three months later, on March 13, 2017, an alias summons was issued by the clerk

¹ Plaintiff also named Pacific Cycle, Inc., the manufacturer of the bicycle, as a defendant in his complaint. Pacific Cycle, Inc., however, was dismissed as a defendant pursuant to a settlement agreement subsequent to the filing of this appeal.

of the circuit court to defendant at its registered agent's address on South LaSalle Street in Chicago, the same address as was indicated on the original summons. A process server affidavit filed in the circuit court indicates that the alias summons was served the same day, March 13, 2017, at the provided address. Thereafter, on March 17, 2017, plaintiff filed the return of the alias summons and the process server affidavit with the court, and, for reasons unexplained by the record, obtained another form "progress call order" setting the matter on the progress call for June 9, 2017. Defendant filed its appearance two weeks later.

¶ 7 Thereafter, on May 3, 2017, defendant filed a motion to dismiss the complaint pursuant to Rule 103(b) claiming that plaintiff failed to exercise reasonable diligence in serving it with process. In support of its motion, defendant asserted that plaintiff failed to serve it until six months after the complaint was filed and six months after the statute of limitations expired. Defendant noted that the record contained no evidence of any alternative efforts made by plaintiff to serve it earlier. Defendant maintained that plaintiff knew of its location as its registered agent was listed with the Illinois Secretary of State. Defendant further claimed that it was unaware of this lawsuit prior to being served with the complaint. In its prayer for relief pursuant to Rule 103(b) defendant requested that the complaint be dismissed with prejudice.

¶ 8 In response, plaintiff argued that in the December "progress call order" the circuit court had already determined he exercised due diligence in serving defendant when it signed the March "progress call order." In support of this conclusion, plaintiff argued these "progress call orders" were the equivalent of a finding of due diligence pursuant to the circuit court's standing order where the standing order provided in part, "If due diligence is found, the case will be continued to the next progress call." Thus, according to plaintiff, the standing order "clearly and unambiguously grants the Plaintiff a final date of March 17, 2017, for service of summons upon

[the] unserved Defendant.” Plaintiff further argued that defendant was aware of the lawsuit before it was filed. No affidavit was filed on plaintiff’s behalf in support of his reasonable diligence claim.

¶ 9 In reply, defendant asserted that when entering the December “progress call” order the circuit court did not rule or make any finding of due diligence. Defendant further argued that the deadline set in the December “progress call” order was not an *ipso facto* finding of due diligence and maintained that plaintiff failed to offer any evidence of such diligence. Defendant maintained that, as a large company, it could have been served at the time the complaint was filed and that plaintiff’s request for an alias summons in December 2016 was evidence that plaintiff’s delay was not inadvertent.

¶ 10 Pursuant to the circuit court’s written order of June 13, 2017, a hearing on the motion to dismiss occurred, although no transcript or bystander’s report is included in the record on appeal. After the matter was fully briefed and argued, the circuit court granted defendant’s motion to dismiss with prejudice. The order did not set forth the reasons for the circuit court’s finding. This appeal followed.

¶ 11 ANALYSIS

¶ 12 On appeal, plaintiff contends that the circuit court abused its discretion when it granted defendant’s Rule 103(b) motion, in light of the fact it had previously granted him until March 17, 2017, to serve defendant. Plaintiff maintains that defendant was served on March 13, 2017, and thus, pursuant to that order, he was diligent in serving defendant.

¶ 13 In response, defendant argues that because the record is devoid of evidence that plaintiff made any attempts to serve it until almost six months after the complaint was filed, it was not an abuse of discretion to find a lack of reasonable diligence, and the circuit court properly dismissed

the complaint.

¶ 14 Whether an action should be dismissed for lack of diligent service pursuant to Rule 103(b) is a decision within the sound discretion of the circuit court. *Segal v. Sacco*, 136 Ill. 2d 282, 286 (1990). The circuit court's ruling on a Rule 103(b) motion to dismiss will not be disturbed on review absent an abuse of that discretion. *Case v. Galesburg Cottage Hospital*, 227 Ill. 2d 207, 213 (2007). An abuse of discretion will be found where the circuit court's decision is arbitrary, unreasonable, or fanciful, or where no reasonable person would adopt the court's view. *Emrikson v. Morfin*, 2012 IL App (1st) 111687, ¶ 14.

¶ 15 Rule 103(b) provides, in relevant part: "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 ***[.]" Ill. S. Ct. R. 103(b) (eff. July 1, 2007). Rule 103(b) further provides that, "[i]n 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." *Id.*

¶ 16 Our supreme court has held that the purpose of Rule 103(b) is to prevent the intentional delay of serving summons which would postpone service for an indefinite length of time after the statutory period of limitations had run. *Case*, 227 Ill. 2d at 221-22; *Segal*, 136 Ill. 2d at 286-87. The rule is intended to protect defendants from unnecessary delays in receiving service of process and to prevent plaintiffs from circumventing the statute of limitations. *Segal*, 136 Ill. 2d at 286. Rule 103(b) does not provide a specific time limitation by which a defendant must be served. *Case*, 227 Ill. 2d at 213. Instead, the court must consider the amount of time that has

passed in relation to all the other facts and circumstances of the individual case. *Id.* The essential purpose of the rule is to promote “the expeditious handling of suits by giving trial courts wide discretion to dismiss when service is not effected with reasonable diligence.” *Segal*, 136 Ill. 2d at 285-86.

¶ 17 When moving for dismissal under Rule 103(b), a defendant must make a *prima facie* showing that the plaintiff failed to act with reasonable diligence in effectuating service after filing the complaint. *Mular v. Ingram*, 2015 IL App (1st) 142439, ¶ 21. This court has previously found that delays as short as four months and seven months were sufficient to demonstrate a *prima facie* showing that the plaintiff failed to act with reasonable diligence in effectuating service. See *Emrikson*, 2012 IL App (1st) 111687, ¶ 19 (citing *Verploegh v. Gagliano*, 396 Ill. App. 3d 1041, 1045 (2009), *Long v. Elborno*, 376 Ill. App. 3d 970, 980 (2007)); *Wilder Chiropractic, Inc. v. State Farm Fire and Casualty Co.*, 2014 IL App (2d) 130781, ¶¶ 81, 84 (four month delay); *Kreykes Electric, Inc. v. Malk and Harris*, 297 Ill. App. 3d 936, 943-44 (1998) (five month delay); *Womick v. Jackson County Nursing Home*, 137 Ill. 2d 371, 380-81 (1990) (affirming the trial court’s finding that the plaintiff did not act with reasonable diligence in waiting several months (after filing suit two days before expiration of limitations period) to serve defendant, despite the defendant’s actual knowledge of pendency of suit, where defendant’s whereabouts were known and it was easily served).

¶ 18 After the defendant demonstrates that the length of 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 reasonable explanation for the delay in service. *Resurgence Capital, LLC v. Kuznar*, 2017 IL App (1st) 161853, ¶ 26. To meet his burden, the plaintiff must present an affidavit or other evidentiary materials which demonstrate that the delay in service was reasonable and

justified under the circumstances. *Kole v. Brubaker*, 325 Ill. App. 3d 944, 949-50 (2001). The plaintiff must establish his diligence factually with an affidavit that conforms with evidentiary rules. *Tischer v. Jordan*, 269 Ill. App. 3d 301, 307 (1995). If the plaintiff fails to provide a reasonable explanation for the delay, the circuit court may dismiss the action against the defendant pursuant to Rule 103(b). *Emrikson*, 2012 IL App (1st) 111687, ¶ 17.

¶ 19 A Rule 103(b) motion is resolved using an objective standard of reasonable diligence by considering various factors in light of the rule's purpose. *Kole*, 325 Ill. App. 3d at 950. A plaintiff's subjective intent is immaterial. *Emrikson*, 2012 IL App (1st) 111687, ¶ 20. The factors to be considered include: (1) the length of time plaintiff used to obtain service of process; (2) plaintiff's activities during that time; (3) plaintiff's knowledge of defendant's location; (4) the ease with which plaintiff could have ascertained defendant's whereabouts; (5) whether defendant had actual knowledge of the pending action; (6) special circumstances which affected plaintiff's efforts; and (7) whether defendant was actually served. *Segal*, 136 Ill. 2d at 287. The circuit court's determination of a plaintiff's lack of diligence is thus "a fact-intensive inquiry suited to balancing, not bright lines." (Internal quotation marks omitted.) *Silverberg v. Haji*, 2015 IL App (1st) 141321, ¶ 32 (quoting *McRoberts v. Bridgestone Americas Holding, Inc.*, 365 Ill. App. 3d 1039, 1042 (2006)).

¶ 20 We observe that there is no transcript of the hearing on the motion or a bystander's report of the proceeding (see Ill. S. Ct. R. 323(c) (eff. July 1, 2017)) included in the record on appeal. The burden to provide a sufficient record on appeal is on the appellant (*Webster v. Hartman*, 195 Ill. 2d 426, 432 (2001)), here plaintiff. In the absence of that record, we must presume that the court's order conformed to the law and had a sufficient factual basis. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). Moreover, any doubts that arise from an insufficient record will be

resolved against the appellant. *Corral v. Mervis Industries, Inc.*, 217 Ill. 2d 144, 157 (2005).

¶ 21 But for a few words and phrases, plaintiff's opening brief is identical to his response to defendant's motion to dismiss, which was presented to, reviewed by, and argued before the circuit court. In addition, plaintiff presented no affidavit or other evidentiary materials to the circuit court as required to support his claim of reasonable diligence. See *Kole*, 325 Ill. App. 3d at 949-50; *Tischer*, 269 Ill. App. 3d at 307. Given our standard of review and the fact that the circuit court's consideration of a plaintiff's lack of diligence is an objective, fact-intensive inquiry (*Silverberg*, 2015 IL App (1st) 141321, ¶ 32), this fact, along with the lack of an appropriate record, require us to accord great deference to the circuit court's judgment (*Taylor v. County of Cook*, 2011 IL App (1st) 093085, ¶ 23). Without an adequate record of the circuit court's reasoning regarding its finding that plaintiff failed to exercise reasonable diligence in serving defendant we have no basis upon which to find the court's ruling arbitrary or unreasonable. In order for this court to determine if the circuit court's reasoning was arbitrary or unreasonable, we must necessarily know its reasoning. See *Corral*, 217 Ill. 2d at 156 ("An issue relating to a circuit court's factual findings and basis for its legal conclusions obviously cannot be reviewed absent a report or record of the proceeding."); *Illinois Founders Insurance Co. v. Williams*, 2015 IL App (1st) 122481, ¶ 56 (finding that, absent a report of proceeding or bystander's report of a hearing, the appellate court could not "divine the trial court's reasoning" in denying a motion and thus could not determine whether the court abused its discretion). It is not enough that plaintiff reasserts in his appellate brief the same arguments that he presented to the circuit court, for to give credence to his arguments on appeal would be for us to apply a *de novo* standard of review, something this court cannot do. See *Case*, 227 Ill. 2d at 213. We must review the matter for an abuse of discretion. *Id.* An abuse of discretion will be found where the

circuit court's decision is arbitrary, unreasonable, or fanciful, or where no reasonable person would adopt the court's view. *Emrikson*, 2012 IL App (1st) 111687, ¶ 14. Consequently, without knowing the circuit court's reasoning, we cannot say the circuit court was arbitrary, unreasonable, or fanciful in dismissing plaintiff's complaint. See *Foutch*, 99 Ill. 2d at 392 (concluding that, absent the transcript of the hearing on a motion to vacate, the court had "no basis for holding that the trial court abused discretion in denying the motion").

¶ 22

CONCLUSION

¶ 23 For the reasons stated above, the judgment of the circuit court of Cook County is affirmed.

¶ 24 Affirmed.