

No. 1-13-0649

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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ROBERT P. BURNS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 09 L 3936
	)	
CHRISTOPHER OLSON,	)	Honorable
	)	Moira S. Johnson,
Defendant-Appellee.	)	Judge Presiding.

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JUSTICE SIMON delivered the judgment of the court.  
Presiding Justice Harris and Justice Liu concurred in the judgment.

**ORDER**

¶1 *Held:* Where plaintiff failed to demonstrate that his delay in serving process on defendant was reasonable, the circuit court's order dismissing plaintiff's complaint with prejudice for lack of diligent service is affirmed.

¶2 In this personal injury action, plaintiff, Robert Burns, appeals from an order of the circuit court dismissing his complaint with prejudice due to lack of diligent service on defendant, Christopher Olson. On appeal, plaintiff contends he exercised due diligence and relied on a process server's affidavit that substitute service had been obtained. We affirm.

¶ 3 On April 3, 2009, two days before the statute of limitations expired, plaintiff filed a complaint against defendant, individually and doing business as Olson Residential Development I, and codefendant Art Improvement, Inc. Plaintiff alleged that on April 5, 2007, he was on property owned by defendant and managed, maintained and controlled by defendant and codefendant when he was seriously and permanently injured. Plaintiff alleged defendant and codefendant negligently permitted construction hoses and debris to remain in an unsafe manner on the stairway and walkway of a construction site. Simultaneously with filing the complaint, plaintiff issued a summons to defendant at 3934 N. Lincoln Avenue, and to codefendant at an address in Des Plaines, Illinois. On April 28, 2009, both summons were returned as not served. On the return of service for defendant, the process server indicated that the address on Lincoln Avenue was a realty office, the occupant was a new tenant, and the people there did not know defendant. The address for codefendant in Des Plaines was a single family home.

¶ 4 On June 18, 2009, plaintiff issued an alias summons for defendant at 2057 N. Clinton Avenue, Chicago, Illinois, 60606. On July 13, 2009, a sheriff's deputy indicated he served defendant via substitute service at 2057 N. Clifton Avenue, Chicago, Illinois, 60614. The deputy indicated he left a copy of the summons and complaint at defendant's usual place of abode with a family member or person residing there, age 13 years old or older. Specifically, the deputy left the summons with a 67-year-old woman named Alejandria Dabias. The deputy's notice also indicated he mailed a copy of the summons to defendant at the Clifton Avenue address that same day. Codefendant was also served that day through its registered agent.

¶ 5 On August 3, 2009, the circuit court issued an order setting a case management conference for September 29, 2009, for "Proper Service." The order stated "ALIAS TO ISSUE FOR OLSON." On September 29, 2009, another case management order was entered setting a

conference for November 10, 2009, for proper service and appearance of defendants. Plaintiff was also granted leave to appoint A.B.C. Accounts—L. Smith as special process server. On November 10, 2009, a case management order was entered scheduling a conference for proper service and appearance of defendants. On December 15, 2009, a case management order was entered scheduling a conference for the appearance of defendants.

¶ 6 On January 19, 2010, the circuit court dismissed the case for want of prosecution because plaintiff failed to appear in court. On February 19, 2010, plaintiff moved to vacate the dismissal stating that plaintiff's counsel was on trial in another courtroom when this case was dismissed. On March 15, 2010, plaintiff's motion was stricken or withdrawn from the court's call. Over seven months later, on October 28, 2010, plaintiff filed a "RE-NOTICE OF MOTION" for his motion to vacate the dismissal for want of prosecution. On November 9, 2010, the circuit court granted plaintiff's motion and vacated the dismissal for want of prosecution. On December 2, 2010, the circuit court entered a case management order setting a conference for the appearance of defendants.

¶ 7 On January 10, 2011, the circuit court again dismissed the case for want of prosecution. On February 10, 2011, plaintiff filed a motion to vacate the dismissal. There is no notice of motion in the record for that date. On May 19, 2011, plaintiff filed a notice of motion with a copy of his February motion to vacate the dismissal for want of prosecution. On June 15, 2011, plaintiff filed a re-notice of that motion. On June 30, 2011, the circuit court granted plaintiff's motion and vacated the dismissal for want of prosecution.

¶ 8 On July 11, August 8, and September 7, 2011, the circuit court entered case management orders scheduling conferences for the appearance of defendants. The September order further indicated that the conference scheduled for November 10, 2011, would also address a motion for

default. However, on November 10, 2011, the circuit court dismissed the case for want of prosecution for the third time. On November 22, 2011, plaintiff filed a motion to vacate the dismissal claiming counsel did not see the matter on the court's call. Plaintiff further moved for leave to file a motion for default on the basis that defendant and codefendant never appeared, answered or otherwise pled to the cause of action. On December 19, 2011, the circuit court vacated the dismissal for want of prosecution, granted plaintiff seven days to file a default motion, and scheduled a conference for a hearing on that motion.

¶ 9 On January 17, 2012, defendant filed a special and limited appearance in this case, and the following day, moved to quash service. Defendant stated that he never resided at, nor had any affiliation with, the Clifton Avenue address. Accordingly, defendant argued that he was never served through the alleged substitute service, and the improper service must be quashed. Attached to the motion was an affidavit from defendant averring that he never resided at the Clifton Avenue address, had no affiliation with that address, and that he had resided at 1512 W. Wilson Avenue since May 2008.

¶ 10 On January 23, 2012, the circuit court granted defendant's motion to quash service. On February 10 and April 6, 2012, plaintiff issued alias summons for defendant at the Wilson Avenue address. On April 10, May 1 and June 26, 2012, the circuit court entered case management orders setting conferences for proper service. Also on June 26, 2012, plaintiff issued a third alias summons for defendant at the Wilson Avenue address. On August 14, 2012, the circuit court entered another case management order setting a conference for proper service.

¶ 11 On September 21, 2012, plaintiff moved for leave to obtain mail service of defendant pursuant to section 2-203 of the Code of Civil Procedure (735 ILCS 5/2-203 (West 2012)). Attached to the motion was an affidavit from plaintiff's counsel stating that diligent efforts at

service were made without success, and claiming defendant was actively avoiding service of process. Also attached was an affidavit from process server Leonard Smith stating that he made numerous attempts to serve defendant at the Wilson Avenue address, but that he was unable to gain access to the premises beyond the outer lobby. Smith stated that numerous attempts to contact any resident in the building by ringing the bell in the outer lobby were unsuccessful. On October 1, 2012, the circuit court granted plaintiff leave to serve defendant through the mail. On October 4, 2012, plaintiff issued another alias summons for defendant at the Wilson Avenue address.

¶ 12 On November 5, 2012, defendant moved to dismiss plaintiff's complaint due to lack of diligent service pursuant to Illinois Supreme Court Rule 103(b) (eff. July 1, 2007). Defendant stated that he was served through regular mail on October 7, 2012, more than three years after plaintiff filed his complaint. Defendant noted that the case had been dismissed multiple times for want of prosecution. Defendant argued that because plaintiff failed to exercise due diligence in service, and because such failure occurred after the statute of limitations expired, the complaint should be dismissed with prejudice.

¶ 13 In his response to defendant's motion, plaintiff stated that the initial summons was issued to the address listed for defendant on the building permit posted at the scene of the occurrence (the Lincoln Avenue address). Plaintiff acknowledged that defendant was not served and that the return from the sheriff's deputy indicated that new tenants were located at that address. Plaintiff further stated that the address for defendant on "Clinton" Avenue was found by his attorney's investigator. The return of service indicated that substitute service had been made, and plaintiff relied on the deputy's representation and assumed proper service was made on defendant.

Plaintiff asserted that very little time passed from the original filing of the suit until service was

obtained, and less time passed between attempted services. Plaintiff further argued that he had no duty to conduct service activity during the time the initial service was in effect (July 13, 2009) until that service had been quashed (January 13, 2012).

¶ 14 In reply, defendant argued that plaintiff was not diligent in obtaining service or in prosecuting his case. Defendant asserted that after plaintiff allegedly made service in July 2009, he did nothing with the case for over two years. Defendant again noted that the case had been dismissed for want of prosecution on multiple occasions. Defendant further noted that plaintiff moved for default nearly two and half years after allegedly having proper service on defendant. Defendant argued that after service was quashed and defendant provided his correct address, plaintiff still did not serve defendant until October 2012, more than three years after the complaint was filed. He further argued that, although plaintiff issued alias summons, it did not negate the fact that proper service was not obtained on defendant until more than three years after the complaint was filed and the statute of limitations had expired.

¶ 15 Following oral arguments on January 24, 2013, the circuit court granted defendant's motion and dismissed plaintiff's complaint as to defendant pursuant to Rule 103(b). The written order indicated that the court found there were 11 months where there was no activity in the case, and the dismissal was granted pursuant to *Viking Dodge Inc. v. Hofmann*, 161 Ill. App. 3d 186 (1987). The court dismissed defendant from the case with prejudice and expressly stated in the written order that, pursuant to Supreme Court Rule 304(a) (eff. Feb. 26, 2010), there was no just reason to delay enforcement or appeal from the order. There is no report of proceedings for the hearing.

¶ 16 On appeal, plaintiff contends the circuit court erred in dismissing his complaint against defendant because he exercised due diligence in obtaining service on defendant pursuant to Rule

103(b). Plaintiff argues that he relied on the process server's return of service indicating that substitute service had been made, and therefore, had no reason to think the address found through an investigation was incorrect. Plaintiff further argues that after service was quashed, he issued three alias summons for defendant with only brief time periods between each one, and once the process server indicated he was unable to serve defendant, plaintiff expeditiously requested special service. In addition, plaintiff claims the circuit court based its ruling solely on *Viking Dodge*, and argues this court should evaluate whether the instant case is factually distinguishable from that case.

¶ 17 Defendant argues that he made a *prima facie* showing that plaintiff failed to make diligent service, and plaintiff failed to present any evidence whatsoever that he acted with diligence. Defendant notes that he was served three and a half years after plaintiff filed the complaint, and eight and a half months after the improper service had been quashed. Defendant argues that there are numerous unanswered questions as to why plaintiff tried to serve him at the Clifton Avenue address, but plaintiff never filed an affidavit detailing the facts supporting his claim of diligent service.

¶ 18 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.

¶ 19 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 and shall not bar any claim against any other party based on vicarious liability for that dismissed defendant's conduct. \*\*\* In 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." (eff. July 1, 2007).

¶ 20 Our supreme court has held that the primary reason for its passage of Rule 103(b) was 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. *Case*, 227 Ill. 2d at 213. 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.

¶ 21 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. *Emrikson*, 2012 IL App (1st) 111687, ¶ 17. This court has previously found that delays as short as five months and seven months were sufficient to demonstrate a *prima facie* showing that the plaintiff failed to act with reasonable diligence in effectuating service. *Emrikson*, 2012 IL App (1st) 111687, ¶ 19, citing *Verploegh v. Gagliano*, 396 Ill. App. 3d 1041, 1045 (2009) (five month delay), *Long v. Elborn*, 376 Ill. App. 3d 970, 980 (2007) (seven month delay showed lack of reasonable diligence).

¶ 22 After the defendant shows 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. *Emrikson*, 2012 IL App (1st) 111687, ¶ 17. To meet his burden, the plaintiff must present an affidavit or other evidentiary materials which show 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.

¶ 23 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.

¶ 24 Here, we find that defendant made a *prima facie* showing that plaintiff failed to act with reasonable diligence in effectuating service upon him. Plaintiff filed his complaint on April 3, 2009. Defendant was not served until October 7, 2012, three and a half years after the complaint was filed. Furthermore, plaintiff learned defendant's correct address on January 23, 2012, when the circuit court quashed the improper service. However, plaintiff did not serve defendant until eight and a half months later. These delays suggested a lack of diligence, and the burden then shifted to plaintiff to provide a satisfactory explanation for his delay.

¶ 25 Our review of the record reveals that plaintiff failed to meet his burden. In his written response to defendant's motion to dismiss, plaintiff stated that the address for defendant on Clinton Avenue was found by his attorney's investigator. Plaintiff further stated that when he received the return of service indicating that substitute service had been made on defendant at that address, he relied on the deputy's representation and assumed service was properly made. In addition, plaintiff made the conclusory assertion that very little time had passed from the original filing of the suit until service was obtained, and less time passed between attempted services. However, plaintiff's subjective and conclusory assertions were immaterial and insufficient to meet his burden.

¶ 26 Plaintiff failed to provide the evidentiary support required to show that his delay was reasonable and justified under the circumstances in this case. Plaintiff presented no affidavits or any evidence, whatsoever, to support his factual claims. As defendant points out, there are numerous unanswered questions as to why plaintiff tried to serve defendant at the Clifton

Avenue address, where plaintiff assumed substitute service had been made. There is no affidavit describing how that address was obtained and why plaintiff thought it was defendant's address. There is no evidence to explain the multiple failed attempts at service at defendant's correct address. Plaintiff's statement in his written response that the process server could not gain access to the building was not sufficient. Plaintiff needed to provide an affidavit from the process server, or some other form of evidence, to support his factual claims. Based on plaintiff's failure to demonstrate that his delay in service was reasonable, we find that the circuit court did not abuse its discretion when it granted defendant's motion and dismissed the complaint against defendant pursuant to Rule 103(b).

¶ 27 In light of our ruling, we decline to fully address plaintiff's argument that the circuit court improperly based its ruling solely on the holding of *Viking Dodge*. We find it sufficient to state that no report of proceedings, in any format, from the hearing on defendant's motion to dismiss was provided to this court. This court has no knowledge of what arguments were made by counsel, what authorities were relied upon, or how the court applied the reasoning from *Viking Dodge*, or any other case, to the facts of this case. Under these circumstances, we must presume the circuit court acted in conformity with the law and ruled properly after considering the evidence before it. *Webster v. Hartman*, 195 Ill. 2d 426, 433-34 (2001); *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984).

¶ 28 For these reasons, we affirm the judgment of the circuit court of Cook County dismissing plaintiff's complaint against defendant pursuant to Rule 103(b).

¶ 29 Affirmed.