

2014 IL App (2d) 130644-U
No. 2-13-0644
Order filed August 12, 2014

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

MEREDITH C. KOCH,)	Appeal from the Circuit Court
)	of Kane County.
Plaintiff-Appellant,)	
)	
v.)	No. 11-L-334
)	
KELSEY P. O'CONNOR and JOHN J.)	
O'CONNOR,)	Honorable
)	James R. Murphy,
Defendants-Appellees.)	Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Justices Hudson and Spence 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 11-month delay was sufficient for defendants' prima facie case, and plaintiff provided no evidence of a reasonable excuse for failing to serve them.

¶ 2 Plaintiff, Meredith C. Koch, appeals the trial court's order dismissing her complaint against defendants, Kelsey P. O'Connor and John J. O'Connor, under Illinois Supreme Court Rule 103(b) (eff. July 1, 2007). She contends that the trial court erred in dismissing the

complaint after denying her request for an evidentiary hearing and in denying her motion to reconsider. We affirm.

¶ 3

I. BACKGROUND

¶ 4 Plaintiff was involved in a motor vehicle accident with defendants on June 16, 2009. A police report prepared at the time contained defendants' address. Plaintiff filed her complaint on June 16, 2011, the last day before the expiration of the limitations period. A summons was issued by the clerk of the court, but was never placed for service. On September 1, 2011, the suit was dismissed for want of prosecution. On November 30, 2011, plaintiff moved to vacate the dismissal. That motion was granted on December 6, 2011.

¶ 5 Between December 6, 2011, and June 25, 2012, the case was continued for status of service three times. No summons was served during that time. On July 25, 2012, plaintiff issued a summons. On July 27, 2012, defendants were both served at the address that was listed in the police report.

¶ 6 Defendants moved to dismiss under Rule 103(b), contending that plaintiff failed to serve them before the statute of limitations had run. A briefing schedule was entered and a hearing was set for November 14, 2012. Plaintiff failed to file a response brief and, at the hearing, was granted an extension of time to do so. Plaintiff then responded that special circumstances applied to excuse the late service. In particular, plaintiff alleged that defendants' insurer had actual notice of the existence of a claim; plaintiff was still undergoing treatment when the complaint was filed, which was a factor in negotiating a settlement with the insurer; the insurer agreed to the filing of the complaint to avoid the limitations period running while a settlement was being considered; and service was made on defendants promptly once the insurer would not agree to delay service. Plaintiff did not attach any evidence to the response.

¶ 7 Defendants filed a reply arguing in part that plaintiff failed to provide any evidence of an agreement between plaintiff and the insurer to forgo service of summons and that the fact that a summons was issued when the complaint was filed negated plaintiff's assertion. Defendants also argued that there was no evidence that they were actually aware of the existence of the lawsuit.

¶ 8 During the hearing, both parties made arguments based on the case of *McRoberts v. Bridgestone Americas Holding, Inc.*, 365 Ill. App. 3d 1039, 1042 (2006). Defendants noted the length of time it took to obtain service and the ease with which their location could be ascertained, given that their address was in the police report and that they were listed in local telephone directories. Plaintiff argued that special circumstances applied to excuse the late service because (1) the insurer was given notice of the claim and "upon information and belief" defendants were aware of the claim through the insurer; (2) defendants had ample opportunity to investigate the claim; (3) defendants' agent represented to plaintiff that there was no issue as to liability; (4) plaintiff continued to undergo treatment, increasing her damages, and delaying efforts to settle the claim; (5) defendants' agents concurred in plaintiff's filing the complaint to avoid the running of the statute of limitations while a settlement was being considered; and (6) promptly after the insurer indicated a lack of concurrence in delaying service, plaintiff obtained service on defendants.

¶ 9 Plaintiff's counsel requested leave to conduct an evidentiary hearing with regard to special circumstances and stated that, had he known that defendants would deny the facts underlying the issue, he would have provided affidavits and exhibits in support of the request for an evidentiary hearing. Counsel noted documents purporting to show that he had suggested delaying service to avoid litigation costs and that a representative of the insurer agreed to the filing of the complaint to avoid the running of the limitations period. The court asked if the

documents contained any writing by the insurer agreeing to delay service. Counsel reviewed the documents and indicated that there were no writings by the insurer agreeing to delay service, but that there were statements by counsel about delaying service to avoid litigation costs. There also was a note by counsel recording a telephone conversation in which the insurer agreed that plaintiff could file the complaint in order to avoid the statute of limitations running and could delay service so that a settlement could be pursued. The court determined that there was insufficient evidence of special circumstances and denied the motion for an evidentiary hearing. The court then dismissed the action with prejudice, finding that plaintiff had not exercised reasonable diligence in serving defendants and that there were no special circumstances to excuse the late service.

¶ 10 Plaintiff moved to reconsider and, for the first time, provided an affidavit. Plaintiff's counsel averred that he informed the insurer that he would not serve defendants or actively prosecute the case in light of uncertainty about future medical costs. Counsel averred that they agreed that he would inform the insurer once costs were determined or if it became necessary for the insurer to involve counsel in anticipated litigation. Counsel also provided documents showing communications between plaintiff and the insurer. None of those documents showed an agreement about service. The documents showed that, in July 2009, plaintiff informed the insurer of her ongoing treatment. In September 2010, the insurer sent plaintiff a request for her social security number and sent forms to be filled out. In February 2011, an adjuster sent a letter stating that the case had been assigned and handwritten on it was "needs SSN." On May 15, 2012, another adjuster wrote that the insurer was not waiving any defenses regarding service.

¶ 11 At the hearing on the motion, the trial court stated that the first time plaintiff requested to present additional evidence was at the hearing on the motion to dismiss. The court further found

that the materials plaintiff sought to present were previously available. The court stated that there was no evidence that defendants were ever informed of the lawsuit other than a suggestion that the insurer would have informed them of it. The court also found that the communications between plaintiff and the insurer were insufficient to show special circumstances and that no further evidence was needed to determine the issue. The motion to reconsider was denied, and plaintiff appeals.

¶ 12

II. ANALYSIS

¶ 13 Plaintiff contends that the trial court erred in denying her motion for an evidentiary hearing, granting the motion to dismiss, and denying her motion to reconsider.

¶ 14 Illinois Supreme Court Rule 103(b) (eff. July 1, 2007) 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. The rule is designed to prevent the intentional delay of service for an indefinite amount of time to circumvent the limitations period. *Emrikson v. Morfin*, 2012 IL App (1st) 111687, ¶ 16.

¶ 15 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. *Id.* ¶ 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.* In order to meet this burden, it is incumbent upon the plaintiff to explain, by way of affidavit or other competent evidence, that the delay in service was reasonable and justified under the circumstances. *Kole v. Brubaker*, 325 Ill. App. 3d 944, 949-50 (2001); see also *Mayoral v. Williams*, 219 Ill. App. 3d 365, 370 (1991) (“diligence must be established factually, by affidavits in conformance with the

rules of evidence”); *Pisciotta v. National Heater Co.*, 21 Ill. App. 3d 73, 76 (1974) (plaintiff failed to demonstrate diligence where “in the most conclusory manner, the [attorney’s] affidavit alleged that diligent efforts were made to locate defendant” but “did not mention any specific things that plaintiff did in this regard”). 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). *Emrikson*, 2012 IL App (1st) 111687, ¶ 17.

¶ 16 A consideration of a party’s diligence, or lack thereof, under Rule 103(b) is a fact-intensive analysis. *McRoberts*, 365 Ill. App. 3d at 1042. 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).

¶ 17 Plaintiff initially contends 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. *Id.* at 213. 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. *Emrikson*, 2012 IL App (1st) 111687, ¶ 14.

¶ 18 We first consider the length of time used to obtain the service of process. Plaintiff’s initial complaint was filed on June 16, 2011, the last day before the end of the limitations period.

See 735 ILCS 5/13-202 (West 2010) (providing a two-year statute of limitations for personal injury actions). Defendants were not served between that date and November 30, 2011, when the complaint was dismissed for want of prosecution. After that dismissal was vacated on December 6, 2011, service was not completed until July 27, 2012. Thus, the delay was approximately 11 months while the suit was not dismissed for want of prosecution and was approximately 13 months total from when it was first filed. 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). Plaintiff does not dispute that determination. Instead, relying on *McRoberts*, she argues that special circumstances applied or, in the alternative, that the court should have allowed her to present evidence of special circumstances.

¶ 19 In *McRoberts*, the plaintiff in a personal injury action was engaged in active settlement negotiations with the defendant's insurer. The plaintiff filed suit to avoid the matter being barred by the statute of limitations. The plaintiff then wrote to the insurer, stating that he had withheld service in an effort to resolve the matter without extreme expenses to both parties. The plaintiff stated, " '[i]f you feel that you cannot go forward, please advise and I will serve the parties.' " *McRoberts*, 365 Ill. App. 3d at 1041. The insurer acknowledged the letter in writing, but was silent on the matter of service. The plaintiff and the insurer continued to correspond regularly, and there was documentation showing that a settlement was being discussed. The plaintiff also told the court during that time that settlement negotiations were taking place. When the insurer expressed concern about the defendant not being served, the plaintiff referenced the settlement negotiations in a letter and served the defendant. The defendant moved to dismiss, the trial court granted the motion, and the Fifth District reversed. *Id.* at 1046.

¶ 20 In reversing, the Fifth District found that special circumstances existed because the plaintiff informed the insurer of the claim, the insurer specifically contacted the plaintiff to handle the claim on behalf of the defendant, the parties were in active contact and engaged in informal discovery, and the plaintiff specifically told the insurer that he was withholding service and asked the insurer to advise him if that arrangement was unacceptable. *Id.* at 1043-45. The court stressed that there was constant communication between the parties. Thus, the case was not one in which the plaintiff failed to serve the defendant out of inadvertence or neglect. Equally important was the insurer's failure to object to the lack of service when it was specifically given the opportunity to do so. Finally, the defendant was promptly served when the insurer objected. The court observed that it was in both parties' interests to save litigation costs by resolving the matter before service was accomplished and that, through informal discovery, the defendant was able to review the plaintiff's medical records without incurring litigation costs. *Id.* at 1044-45. Thus, balancing all of the factors, the court concluded that the trial court abused its discretion when it dismissed the action. *Id.* at 1045-46.

¶ 21 *McRoberts* is distinguishable. In *McRoberts*, the defendant was aware of the lawsuit and there was evidence of informal discovery, constant communications between the parties about a settlement, and a specific agreement to forgo service. Here, however, nothing showed that there was constant communication about a settlement. Instead, when writings from the insurer were finally presented, they indicated nothing more than that a claim was in the process of being filed. There also was no evidence that defendants were actually aware of the existence of the lawsuit. Most important, there was nothing in writing to show an agreement by the insurer to forgo serving defendants. As the trial court noted, that a summons was initially issued seems to contradict that. Plaintiff's counsel asserted that he had a telephone conversation about the

matter, but he failed to provide any affidavit as to that fact until after the court had ruled on the matter. It was plaintiff's burden to show special circumstances with affidavits or other competent evidence when special circumstances were raised. Thus, this case is not like *McRoberts*, where specific written evidence showed that the plaintiff was led to believe that it was acceptable to forgo service. Accordingly, the trial court's determination that plaintiff failed to exercise due diligence was not an abuse of discretion.

¶ 22 Likewise, the trial court did not err in denying plaintiff's motion for an evidentiary hearing. As noted, the materials plaintiff referenced at the hearing were insufficient to show that special circumstances existed. Plaintiff contends that counsel did not know that defendants would disagree with the facts underlying the special-circumstances argument and therefore he could not have been prepared with evidence at the hearing. But, as previously stated, it was plaintiff's burden to prove special circumstances with affidavits or other evidence. Moreover, contrary to plaintiff's assertions about lack of knowledge, the record shows that defendants clearly stated their concerns about lack of service and filed a reply arguing in part that plaintiff failed to provide any evidence of an agreement between plaintiff and the insurer to forgo service. Thus, plaintiff not only had the burden of proof, but also was clearly on notice before the hearing that defendants were contesting the argument that special circumstances applied.

¶ 23 Plaintiff next argues that the trial court erred in denying her motion to reconsider, in which she sought to provide an affidavit from counsel and other evidence. The intended purpose of a motion to reconsider is to bring to the court's attention newly discovered evidence, changes in the law, or errors in the court's previous application of the existing law. *In re Marriage of Epting*, 2012 IL App (1st) 113727, ¶ 41. "Newly discovered evidence" is evidence that was not available prior to the hearing. *Emrikson*, 2012 IL App (1st) 111687, ¶ 30. "In the absence of a

reasonable explanation regarding why the evidence was not available at the time of the original hearing, the circuit court is under no obligation to consider it.” *Id.*

¶ 24 Here, the trial court correctly found that the information counsel sought to present was available at the time of the original proceedings. It was not newly discovered evidence. Thus, the trial court was not obligated to consider it. Accordingly, it did not err in denying the motion.

¶ 25

III. CONCLUSION

¶ 26 The trial court did not abuse its discretion when it denied counsel’s request for an evidentiary hearing, dismissed the complaint, and denied the motion to reconsider. Accordingly, the judgment of the circuit court of Kane County is affirmed.

¶ 27 Affirmed.