No. 1-10-0693

FIFTH DIVISION
February 18, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

SALVADOR NAVARRO,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 09 L1 711
	)	
IKO CHICAGO, INC.,	)	Honorable
	)	Diane J. Larsen,
Defendant-Appellee.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Justices Joseph Gordon and Epstein concurred in the judgment.

O R D E R

HELD: Where evidence supported finding of reasonable diligence in obtaining service, and defendant waived defects in service of process by filing a general appearance, the trial court abused its discretion in granting defendant's motion to dismiss; reversed and remanded.

Plaintiff, Salvador Navarro, appeals from an order of the circuit court of Cook County granting defendant IKO Chicago,

Incorporated's (IKO Chicago) motion to dismiss and quash plaintiff's second alias summons. On appeal, plaintiff contends that the circuit court erred in granting defendant's motion where plaintiff exercised reasonable diligence and defendant was properly served.

Plaintiff's complaint arises from an alleged slip and fall on the premises of IKO Chicago in March 2007. After several failed attempts to serve the registered agent of IKO Chicago, plaintiff served a copy of his complaint on an agent of IKO Midwest. The relationship between these entities is a matter in dispute between the parties. Plaintiff alleges that his process server was told that IKO Midwest was doing business as IKO Chicago. On appeal, IKO Chicago claims that it is a separate entity from IKO Midwest. After filing an appearance in the pending litigation, IKO Chicago moved to quash service pursuant to Supreme Court Rule 102(b) (eff. May 30, 2008) and dismiss proceedings pursuant to Supreme Court Rule 103(b) (eff. July 1, 2007). The circuit court granted IKO Chicago’s motion, from which plaintiff appeals.

In February 2009, plaintiff filed suit against defendant and had summons issued. In March 2009, the Cook County Sheriff's Office attempted to serve Greg Errandi, the registered agent of IKO Chicago at 6600 South Central Avenue, in Chicago. The summons was returned without service five days later. The

sheriff's deputy noted that the office was closed and vacant as the reason for non-service.

In June 2009, plaintiff's attorney was granted leave to appoint a special process server. That month, alias summons was issued containing the registered agent name and address maintained by defendant with the Illinois Secretary of State. Plaintiff's special process server provided an affidavit indicating that he was unable to obtain service at that location because the property was vacant. Plaintiff issued a second alias summons and the special process server was able to obtain the home address of Greg Errandi, the registered agent, and attempted to serve him there. The special process server was informed by Mrs. Errandi, who refused service, that Mr. Errandi no longer worked for defendant and was no longer its registered agent. She also informed the special process server that defendant had relocated to Kankakee, Illinois.

The special process server searched for defendant and found an office location for IKO Midwest, Incorporated in Kankakee, Illinois. The special process server reported that in August 2009, Ramze Dehlah, the head of human resources for IKO Midwest, accepted service on behalf of IKO Chicago. The special process server provided an affidavit stating, in part, that Mr. Dehlah informed him that Mr. Errandi was no longer with IKO Chicago and that IKO Midwest was doing business as IKO Chicago.

Defendant filed a general appearance less than two weeks later, and, in December 2009, filed a motion to quash plaintiff's summons and dismiss the complaint pursuant to Supreme Court Rules 102(b) and 103(b) and section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619 (West 2008)). In that motion, defendant contended that plaintiff had not perfected service on IKO Chicago, stating, "To date plaintiff has still not perfected service upon IKO, despite its worldwide status and offices located throughout the United States and listed online. See www.iko.com." Defendant, in its motion, did not explain the relationship, if any, between IKO Chicago and IKO Midwest. Defendant further alleged that plaintiff was not reasonably diligent in obtaining service because he did not seek to obtain service until after the statute of limitations had expired.

In January 2010, the trial court granted defendant's motion in a written order. In that order the trial court found that as to plaintiff's second alias summons, no return of service was presented in court or via the case's docket report and that in review of the totality of the circumstances defendant's motion should be granted. Plaintiff filed a motion to reconsider, which was heard in February 2010. The trial court denied plaintiff's motion, noting that defendant IKO Chicago and IKO Midwest were separate corporations according to the Secretary of the State of

Illinois and plaintiff never obtained service of process on defendant. Plaintiff now appeals from that order.

In this appeal, plaintiff contends that it properly served defendant in a timely manner, and that the circuit court's order granting the motion to quash and dismiss was erroneous. Defendant responds that plaintiff served a separate entity in IKO Midwest and never served IKO Chicago, the only named defendant. Defendant's motion to dismiss cited both Rule 102(b) and Rule 103(b). Beginning with Rule 102(b), we will address plaintiff's challenges to the circuit court's order in turn.

Where service of process is challenged solely on documentary evidence, as with defendant's Rule 102(b) claim, our review is *de novo*. *Equity Residential Properties Management Corp. v. Nasolo*, 364 Ill. App. 3d 26, 32 (2006). We review the trial court's judgment and not its reasoning to determine whether it reached the correct result. *City of Chicago v. Holland*, 206 Ill. 2d 480, 491 (2003).

Supreme Court Rule 102(b) requires defendant be served within 30 days of the issuance of summons. A private corporation may be served by serving any officer or agent of the corporation in Illinois, by publication and mail, or by substitute service via the Secretary of State. *Capital One Bank, N.A.* v. *Czekala*, 379 Ill. App. 3d 737, 746 (2008). However, a general appearance filed by defendant waives any defect in the service of process.

735 ILCS 5/2-301(a-5) (West 2008); *In re Estate of Ahern*, 359 Ill. App. 3d 805, 812 (2005). A general appearance is any appearance filed which is not in compliance with section 2-301(a) of the Code of Civil Procedure (735 ILCS 5/2-301(a) (West 2008)). *In re Marriage of Buchaino*, 262 Ill. App. 3d 910, 914 (1994). Section 2-301(a) provides that in order to file a special appearance a party's first responsive pleading must challenge either the court's jurisdiction or the service of process. 735 ILCS 5/2-301(a) (West 2008).

Defendant filed its appearance without any language limiting its submission to the court's jurisdiction or challenging the service of process. Therefore, defendant's appearance was not filed as a special or limited appearance in any way. Thus, we conclude that defendant filed a general appearance (*In re Marriage of Buchaino*, 262 Ill. App. 3d at 914), and, by doing so, waived any objection to defects in service under Rule 102(b) (*In re Estate of Ahern*, 359 Ill. App. 3d at 812). We conclude that it is of no moment whether the trial court erred in granting defendant's motion to quash service of processes, pursuant to Rule 102(b), because defendant waived any objection to defects in service by filing the general appearance two months earlier, and by doing so submitted to the jurisdiction of the court.

We likewise find that the trial court erred in granting defendant's motion to dismiss pursuant to Rule 103(b). Our

supreme court has instructed that dismissal with prejudice under Rule 103(b) is "a harsh penalty which is justified when the delay in service of process is of a length which denies a defendant a fair opportunity to investigate the circumstances upon which the liability against [it] is predicated while the facts are accessible." (Internal quotation marks omitted.) *Segal*, 136 Ill. 2d at 288. In determining whether dismissal is proper the circuit court should consider several non-exhaustive factors including: (1) the length of time used to obtain service of process; (2) the activities of plaintiff; (3) plaintiff's knowledge of defendant's location; (4) the ease with which defendant's whereabouts could have been ascertained; (5) actual knowledge on the part of the defendant of pendency of the action as a result of ineffective service; (6) special circumstances which would affect plaintiff's efforts; and (7) actual service on defendant. *Segal*, 136 Ill. 2d at 287. For the reasons that follow, we find that the circuit court abused its discretion, and reverse its judgment and remand the cause for further proceedings consistent with this order.

Our analysis begins with plaintiff's conduct in this case because we find that factor to be the most significant, followed by the special circumstances, which limited plaintiff's ability to actually serve defendant. We will discuss the remaining five factors in turn.

We begin with plaintiff's actions during the six-month period in which he attempted to serve defendant. The record shows that plaintiff began attempting to obtain service on defendant in February 2009, when he filed the suit. During the six-month period preceding defendant's appearance in court, the county sheriff unsuccessfully attempted service at the address of the corporation, which was also the address where the alleged injury occurred. Then the special process server attempted service at that location, and, when that failed, he attempted service at the home of the registered agent. It was at that time that the special process server was made aware that the registered agent was no longer acting as an agent for defendant. The process server then performed an internet search, using the same website defendant cited to in its motion to dismiss and attempted service on the only Illinois business on the company's website with IKO in its title. That location also coincided with the report of IKO Chicago's new location in Kankakee, Illinois. It was then that plaintiff served IKO Midwest, and thereafter, defendant filed its general appearance. Therefore, we find that plaintiff’s conduct in seeking out defendant’s registered agent at its registered address, then at the agent’s home, then attempting service at IKO Midwest, weighs against dismissal for a lack of reasonable diligence.

The second most significant factor requires a determination of whether there were special circumstances which encumbered plaintiff's attempts at serving defendant. We find that special circumstances exist in this case because defendant's conduct frustrated plaintiff's attempts to obtain service. *McCormack v. Leons*, 261 Ill. App. 3d 293, 296 (1994).

In *McCormack*, as in this case, plaintiff made multiple attempts to obtain service in a premises liability action at the known address of defendant, but defendant never returned to the known address, nor was there additional information available for plaintiff to use in obtaining service. *McCormack*, 261 Ill. App. 3d at 295-96. Under those circumstances, this court found that defendant's conduct frustrated plaintiff's ability to obtain service and held that dismissal was an abuse of discretion. *McCormack*, 261 Ill. App. 3d at 296.

Here, defendant provided conflicting assertions before the trial court regarding its locations and affiliation with IKO Midwest, all the while failing to maintain a registered agent and registered address. In its motion to dismiss, defendant cited to its registration with the Secretary of State as evidence that it was a separate and independent entity from IKO Midwest. However, in the same motion, defendant contended that its locations for service were readily obtainable via its website, which did not list IKO Chicago at all, but, instead, listed IKO Midwest.

Contrary to defendant's contentions, the affidavit provided by IKO Midwest's head of human resources does not contradict the affidavit of the special process server. Rather, the affidavit of the special process server provides additional details not covered by the later affidavit of IKO Midwest, in that the special process server averred that he was told by the IKO Midwest affiant that it was doing business as IKO Chicago. However, nothing in the affidavit of IKO Midwest's head of human resources addresses the relationship between IKO Chicago and IKO Midwest. Under these circumstances, we find that defendant's failure to maintain an ascertainable address for service of process frustrated plaintiff’s efforts and thereby created a special circumstance, which was not addressed by the trial court, and weighs against dismissal. *McCormack*, 261 Ill. App. 3d at 295-96.

As to the length of time that plaintiff attempted to obtain service, the record shows that nearly six months lapsed between when the suit was filed and defendant became aware of the suit. During that time, plaintiff received a failed return of service from the sheriff’s office in March 2009, but did not move to appoint a special process server until shortly before the first case management conference in June 2009. Thereafter, plaintiff had all subsequent summons issued immediately after the previous one expired.

In our view, this factor remains neutral until considered in the context of the parties' conduct, specifically plaintiff's efforts to obtain service and defendant's role in frustrating those efforts. Accord *Segal*, 136 Ill. 2d at 288. In *Segal*, the supreme court held that a nearly five month delay in attempting to obtain service was not sufficient to warrant dismissal in light of plaintiff's conduct during that period. *Segal*, 136 Ill. 2d at 288. Thus, we find that the length of time, when considered in conjunction with the parties' conduct, weighs against dismissal.

Our analysis of plaintiff's knowledge of defendant's location also weighs against dismissal. The record shows that plaintiff's suit was based on premises liability, and the alleged injury occurred at 6600 South Central Avenue, the same address that defendant and its registered agent listed with the Secretary of State. Additional information regarding defendant's whereabouts was provided in the motion to dismiss, where defendant asserted that the website www.iko.com provided information regarding their business location. The record shows that IKO Midwest is one of the two Illinois locations for IKO. Moreover, the website also lists IKO Midwest's location in Kankakee, Illinois, the same location that the special process server was given by Mrs. Errandi. Finally, the special process server's affidavit includes information suggesting IKO Midwest

did business as IKO Chicago at the new location. Hence, the only viable information plaintiff obtained regarding defendant's location indicated IKO Midwest was the proper locale for service. Thus, plaintiff's lack of knowledge of defendant's whereabouts weighs against dismissal.

We also find that defendant was difficult to locate, which weighs against dismissal. As noted above, the information from the Secretary of State's office corresponded with a vacant building. Both the sheriff and the special process server were unsuccessful in locating defendant at its registered address. Defendant denies that IKO Chicago and IKO Midwest are the same entity. However, it has never suggested any means by which plaintiff could have reached IKO Chicago, except in its motion to dismiss where it cites its website which does not list IKO Chicago, but, instead lists IKO Midwest. Moreover, defendant was required by section 5.10 of the Business Corporation Act of 1983 (805 ILCS 5/5.10 (West 2008)) to inform the Secretary of State when the address for service became vacant and the registered agent changed. No updated information was indicated by the Secretary of State, and defendant does not contend that it provided updated information, leaving plaintiff with the vacant building as the only physical address for defendant. Thus, we find that defendant was difficult to locate.

In doing so, however, we also acknowledge that plaintiff failed to avail himself of the appropriate statutory remedy when a corporation cannot be served at its registered address, in that plaintiff failed to serve the Secretary of State pursuant to section 5.25 of the Business Corporation Act of 1983. The proper action for plaintiff to take would have been to serve the Secretary of State once it became clear that the registered agent could not be found at the registered address with reasonable diligence. 805 ILCS 5/5.25 (West 2008). In our view, however, plaintiff should not be penalized for attempting to serve the named defendant based on the information available to him at the time, instead of the Secretary of State, given that defendant did not maintain a valid address. Even though plaintiff failed to exercise the available remedy, we conclude that defendant was difficult to locate, which weighs against dismissal.

We next address defendant's actual knowledge of the pendency of the action. The record is clear that the only recipient of service was IKO Midwest. Defendant claims that it is a separate corporation from IKO Midwest, and it was unaware of the suit until August 2009. However, within two weeks of IKO Midwest being served defendant filed its appearance. Defendant failed to explain how it became aware of the suit within two weeks of service of process on a non-party, if, as it claims, IKO Midwest is not affiliated with IKO Chicago. Defendant's contention is

particularly disingenuous, where it acknowledged that it was no longer in business at the time of service, and contradicted itself by indicating IKO Midwest was a proper place for service in its motion to dismiss. Under these circumstances, we conclude that defendant was necessarily aware of the pending suit either before or upon service of process on IKO Midwest, where its response to service was exceptionally short and it was no longer operating. Thus, defendant's knowledge of the pending suit, weighs against dismissal.

Finally, whether plaintiff ever obtained actual service is a point of significant contention between the parties. Defendant contends that it was never served because it is a separate corporation from IKO Midwest. Plaintiff, in essence, contends that IKO Midwest was a proper recipient of service because it was doing business as IKO Chicago and IKO Chicago failed to maintain a proper location for service of process.

We find that defendant was not actually served because each entity retained a separate corporate registration file number, registered agent, agent address, and secretary. Although the special process server averred that he was told that IKO Midwest was operating as IKO Chicago, the record is devoid of any evidence to establish that an agency relationship existed, whereby IKO Midwest so controlled the affairs of IKO Chicago that they are legally one entity, and service on one may be deemed

service on both. *Slates v. International House of Pancakes, Inc.*, 90 Ill. App. 3d 716, 725-26 (1980). Nor did plaintiff obtain substitute service through the Secretary of State as provided by the Business Corporation Act of 1983. 805 ILCS 5/5.25(b)(2) (West 2008). Thus, plaintiff did not serve defendant.

However, failure to obtain actual service, alone, is not sufficient to establish a lack of reasonable diligence. *See Segal*, 136 Ill. 2d at 287 (holding that obtaining actual service is one of seven factors analyzed in determining reasonable diligence). Particularly in this case where defendant's failure to maintain a proper address for service contributed to plaintiff's failure to obtain actual service. Where, as here, the factors, in total, weigh against granting a dismissal, dismissal constitutes an abuse of discretion. *McCormack*, 261 Ill. App. 3d at 296.

In finding that the trial court abused its discretion, we also reject defendant's contention that the time in obtaining service was *per se* unreasonable. As our supreme court indicated in *Segal*, there is no single factor which determines whether plaintiff was reasonably diligent, where the court's determination must be made based on the totality of the circumstances. *Segal*, 136 Ill. 2d at 287. Defendant further misstates the requirements of Rule 103(b), where it claims that

plaintiff must commence the action with reasonable diligence. Instead, Rule 103(b) requires plaintiff attempt service with reasonable diligence, regardless of when plaintiff files the cause of action. *Case v. Galesburg Cottage Hospital*, 227 Ill. 2d 207, 222 (2007).

Accordingly, we hold that the trial court abused its discretion and reverse and remand the cause for further proceedings not inconsistent with this order.

Reversed and remanded.