FIFTH DIVISION
August 31, 2012

No. 1-11-2886

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

BOOKER T. DUNN, JR., DOROTHY DUNN, EMIL DUNN, BOOKER T. DUNN, III, and LONNIE HORNE, Plaintiffs-Appellants, v. BRITTANY PETERSON, Defendant-Appellee.	)	Appeal from the Circuit Court of Cook County No. 10 M1 302946 Honorable James E. Snyder, Judge Presiding.

PRESIDING JUSTICE EPSTEIN delivered the judgment of the court.
Justice Howse and Taylor concurred in the judgment.

¶ 1 *Held*: Trial court did not abuse its discretion in dismissing plaintiffs' action pursuant to Supreme Court Rule 103(b) where they failed to rebut defendant's *prima facie* showing that plaintiffs failed to exercise reasonable diligence in effectuating service. Therefore, we affirm the trial court's order granting defendant's motion for reconsideration of its motion to dismiss.

ORDER

¶ 2 Plaintiffs Booker T. Dunn, Jr., Dorothy Dunn, Emil Dunn, Booker T. Dunn, III and Lonnie Horne appeal from the order of the circuit court dismissing their case pursuant to Illinois Supreme Court Rule 103(b) (eff. July 1, 2007) due to lack of diligence in serving defendant

Brittany Peterson. For the reasons that follow, we affirm the decision of the circuit court.

¶ 3 BACKGROUND

¶ 4 On April 18, 2008, plaintiffs were involved in a motor vehicle accident with defendant. Suit was filed on October 31, 2008. On December 11, 2009, plaintiffs voluntarily dismissed their case without having served defendant. Plaintiffs refiled their action on November 15, 2010, and served defendant on November 30, 2010.

¶ 5 Plaintiffs filed their initial suit in the municipal department of the circuit court of Cook County on October 31, 2008 (Case No. 2008 M1 303105). Summons was issued and placed with the sheriff of Cook County on October 31, 2008. The summons was to be served on defendant, Brittany Peterson, at 1908 Marina Drive, Normal, Illinois, 61761. This address was the same address listed on defendant's driver license, as well as the police report dated April 18, 2008. The record contains an affidavit of defendant, filed in the trial court on January 11, 2011, in which she states that she has maintained this permanent address since August 2004, and that she resides at this address with her parents and brother.

¶ 6 On November 5, 2008, plaintiffs' counsel requested a refund of $60.00 from the sheriff of Cook County. Plaintiffs' counsel explained that it had mistakenly provided a cashier's check payable to the sheriff of McLean County and counsel needed the check refunded and the necessary paperwork so as to attempt service with the correct sheriff's office. On January 28, 2009, the sheriff of Cook County issued the refund check. On January 30, 2009, the sheriff of Cook County returned the summons without effectuating service and noted the reason was that defendant was “out of county.” There is nothing in the record, however, to indicate that a

summons was subsequently placed with the sheriff of McLean County.

¶ 7 Progress calls were held before the court on February 4, 2009, April 24, 2009, June 17, 2009 and September 25, 2009 and were attended by plaintiffs' counsel. On February 4, 2009, a special process server, Jim Zwit, was appointed. On April 24, 2009, plaintiffs' counsel filed an affidavit as to due diligence stating that Mr. Zwit had been "diligently attempting to locate and serve the Defendant," containing simply that conclusory statement, without detailing the efforts to effect service. On June 17, 2009, an alias summons was issued with a return date of July 23, 2009. On July 10, 2009, and September 25, 2009, plaintiffs' counsel filed additional affidavits of due diligence similar to the prior affidavit, but without any additional information. On December 11, 2009, the trial court granted plaintiffs' motion for a voluntary dismissal without prejudice pursuant to section 2-1009 of the Code of Civil Procedure. 735 ILCS 5/2-1009 (West 2008).

¶ 8 The statute of limitations expired on April 18, 2010. On November 15, 2010, within the permitted one year for refiling, plaintiffs refiled their action in the municipal department of the circuit court of Cook County (Case No. 2010 M1 302946). Summons was placed with the sheriff of McLean County on November 15, 2010. Defendant was served on November 30, 2010.

¶ 9 On January 6, 2011, defendant filed her appearance and jury demand. On January 18, 2011, defendant filed a motion to dismiss the action pursuant to Supreme Court Rule 103(b). Plaintiffs filed a response on May 19, 2011. Attached to the response was an affidavit of the special process server, Jim Zwit. Mr. Zwit stated that he "originally attempted service upon Ms. Peterson in McLean County through [his] service personnel but was advised that Ms. Peterson could not be served at the originally provided address." Mr. Zwit also stated that "[t]hereafter

[he] utilized numerous other sources such as drivers license, telephone directories, computer and google searches but was unable to locate another serviceable address." On June 29, 2011, defendant filed her reply.

¶ 10 On July 6, 2011, after hearing oral argument, the trial court entered an order denying defendant's motion to dismiss. The court also granted defendant leave to file a motion for an interlocutory appeal. However, the trial judge further ordered plaintiffs to deliver all of the prior affidavits of due diligence to the judge's chambers by July 13, 2011. These affidavits had not been attached to plaintiffs' response to the motion to dismiss.

¶ 11 On July 18, 2011, defendant filed a motion to reconsider the denial of her motion to dismiss, and to strike the plaintiffs' affidavits of due diligence. After briefing was completed, the trial court heard oral arguments on September 7, 2011 and entered an order granting the motion for reconsideration and dismissing plaintiffs' complaint with prejudice. Plaintiffs filed this timely appeal on October 7, 2011.

¶ 12 ANALYSIS

¶ 13 Plaintiffs initially argue that the trial court had no basis for granting defendant's motion for reconsideration. Citing *Landeros v. Equity Property and Development*, 321 Ill. App. 3d, 57, 65 (2001), plaintiffs note that "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 existing law." Plaintiffs assert that none of these grounds apply in the instant case. Plaintiffs further assert that "[d]efendant should not be excused for failing to seek an interlocutory appeal of the original denial when the record shows her counsel clearly expressed a

desire to do so and the trial court suggested its viability." To the extent plaintiffs are raising the propriety of either the filing of the motion for reconsideration or the trial court's reconsideration of its prior denial of defendant's motion, we note that the denial of a motion to dismiss is an interlocutory order that can be "reviewed, modified, or vacated at any time before final judgment." *Catlett v. Novak*, 116 Ill. 2d 63, 68 (1987); see also *Illinois State Chamber of Commerce v. Pollution Control Board*, 67 Ill. App. 3d 839, 843 (1978) ("[p]ower to vacate and set aside judgment is inherent in all courts of record"). Thus, the trial court had the authority to reconsider its prior denial of defendant's motion to dismiss.

¶ 14 This reconsideration was particularly appropriate here, where the court acknowledged that the denial of the motion to dismiss was based on the court's assumption as to what was contained in the affidavits of diligence – affidavits that were clearly inadequate as we explain below. As the trial court explained: "It's my recollection, * * * that we were all kind of making some degree of assumptions what those affidavits would look like if we had them, but we didn't have them." Additionally, by ordering the delivery of affidavits to his chambers he evidenced a concern about the content of them. We now proceed to the merits of the appeal.

¶ 15 We first note our standard of review. A trial court's ruling on a motion to dismiss pursuant to Illinois Supreme Court Rule 103(b) will not be disturbed absent an abuse of discretion. *Case v. Galesburg Cottage Hospital*, 227 Ill. 2d 207, 213 (2007). A trial court abuses its discretion in its disposition of a Rule 103(b) motion "only if no reasonable person could take the view adopted by the trial court." *Hagemann v. Illinois Workers' Compensation Comm'n*, 399 Ill. App. 3d 197, 204 (2010).

¶ 16 Rule 103(b) provides:

> "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 made 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, 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."

Rule 103(b)'s purpose is to provide for expeditious handling of suits by protecting defendants from unnecessary delays in service of process and by preventing plaintiffs from circumventing the statute of limitations. *Segal v. Sacco*, 136 Ill. 2d 282, 285-86 (1990). As our supreme court has explained: "Rule 103(b) was adopted by this court to effectuate its historical and constitutional mandate to render justice fairly and promptly." *O'Connell v. St. Francis Hospital*, 112 Ill. 2d 273, 282 (1986); see also *Womick v. Jackson County Nursing Home*, 137 Ill. 2d 371, 377 (1990). A defendant has a right to timely service of process which allows the opportunity to

investigate the circumstances of the case while evidence is still fresh and accessible. *Marks v. Rueben H. Donnelley, Inc*., 260 Ill. App. 3d 1042, 1047 (1994); *Green v. Wilmot Mountain, Inc.*, 92 Ill. App. 3d 176, 181 (1980).

¶ 17 The Illinois Supreme Court has explained that when a plaintiff voluntarily dismisses a complaint and later refiles the action, the court examines the circumstances surrounding the plaintiff's service of process during the original action before the dismissal, as well as the refiled action, in determining diligence. See *Case v. Galesburg Cottage Hospital*, 227 Ill. 2d 207, 219 (2007); *Martinez v. Erickson*, 127 Ill. 2d 112, 119 (1989); *Muskat v. Sternberg*, 122 Ill. 2d 41, 48 (1988); *Catlett v. Novak*, 116 Ill. 2d 63, 71 (1987). The interim time period between the dismissal of the original complaint and the refiling is not to be considered. *Case*, 227 Ill. 2d at 222; *Womick*, 137 Ill. 2d at 374–75. However, a voluntary dismissal and refiling " 'does not insulate the plaintiff from the lack of diligence displayed prior to the dismissal.' [Citation.]" *Case*, 227 Ill. 2d at 219.

¶ 18 "In moving for dismissal under Rule 103(b), the defendant is initially required to make a *prima facie* showing that the plaintiff failed to exercise reasonable diligence in effectuating service after filing suit." *Kole v. Brubaker*, 325 Ill. App. 3d 944, 949 (2001). "Once the defendant establishes that the time between the institution of the suit and the date of actual service is indicative of a lack of diligence in the absence of any patently unusual circumstances, the burden shifts to the plaintiff to demonstrate, with specificity and in conformity with the rules of evidence, that reasonable diligence was exercised and to offer an explanation to satisfactorily justify any delay in service." *Id.* at 949-50; accord *Smith v. Menold Construction, Inc*., 348 Ill.

App. 3d 1051, 1058, 811 N.E.2d 357, 363 (2004).

¶ 19 "No absolute time frame exists that will shift the burden and require the plaintiff to offer an explanation for his or her actions." *Kole v. Brubaker*, 325 Ill. App. 3d at 949. Whether the defendant has established a *prima facie* case of lack of diligence is determined on a case-by-case basis. *Id.* In the instant case, defendant adequately made a *prima facie* showing of plaintiffs' unreasonable lack of diligence. Although we do not consider the eleven-month interim period between dismissal and refiling, defendant was not served for 14 months (13½ months in original action plus ½ month in refiled action). Thus, the burden shifted to plaintiffs to give some explanation for the delay.

¶ 20 In order to meet this burden, "it was incumbent upon plaintiff[s] to explain, by way of affidavit or other competent evidentiary materials, that [the] delay in service was reasonable and justified under the circumstances." *Kole v. Brubaker*, 325 Ill. App. 3d at 949-50. A plaintiff *must* give an explanation for any apparent lack of reasonable diligence. *Womick*, 137 Ill. 2d at 380; see also *Mayoral v. Williams*, 219 Ill. App. 3d 365, 370 (1991) ("The diligence must be established factually, by affidavits in conformance with the rules of evidence."); *Pisciotto v. National Heater Co.,* 21 Ill. App. 3d 73, 76 (1974) (finding that 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 plaintiff's intent but, rather, an objective test of reasonable diligence in effecting service. *Lewis v. Dillon*, 352 Ill. App. 3d 512, 518 (2004); *Parker v. Universal Packaging Corp.*, 200 Ill. App.

3d 882, 886 (1990) (same).

¶ 21 We agree with defendant that plaintiffs failed to rebut her *prima facie* showing that they failed to exercise reasonable diligence in serving her. Based on the totality of the circumstances, the trial court did not abuse its discretion in granting defendant's motion to reconsider the denial of defendant's motion to dismiss pursuant to Rule 103(b).

¶ 22 The factors which a court may consider in deciding whether to grant a motion to dismiss pursuant to Rule 103(b) include, but are not limited to: (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 on the part of the defendant of the pendency of the action; (6) special circumstances which would affect the plaintiff's efforts; and (7) actual service on the defendant. *Segal v. Sacco*, 136 Ill. 2d at 287. These factors must be considered in light of the purpose of Rule 103(b). *Id.* Considering these factors, we agree with defendant that the trial court correctly dismissed plaintiffs' action pursuant to Rule 103(b).

¶ 23 As to the first *Segal* factor, as noted earlier, defendant was not served for 14 months. There is no evidence that a summons was ever placed with the sheriff of McLean County. It took plaintiffs over three months to appoint a special process server, who, in turn failed to serve defendant during the ten months before the initial suit was voluntarily dismissed. Defendant was served nearly two years and eight months after the accident occurred, and almost eight months after the statute of limitations had expired. This factor weighs in favor of defendant.

¶ 24 The second *Segal* factor particularly weighs in favor of defendant, who correctly notes

that plaintiffs failed to produce *any specific* evidence showing they exercised reasonable diligence. They failed to provide any evidence of specific attempts by the special process server to effectuate service. Plaintiffs failed to produce any of the three affidavits of due diligence for consideration at the hearing on defendant's motion to dismiss. More importantly, once the affidavits were produced, as required by the trial court, it was clear that the contents of all three were identical, containing only the conclusory statement that "Special Process Server Jim Zwit has been diligently attempting to locate and serve Defendant."

¶ 25 It is important to note that, during the initial hearing on the motion to dismiss, the trial court asked plaintiffs' counsel several questions regarding the affidavits of due diligence to which plaintiffs' counsel responded he did not know. Later, at the hearing on the motion for reconsideration, it was determined that the affiant himself had no personal knowledge of the information contained in the affidavit "other than what [the] special process server [told him.]." Therefore, defendant asserts, "even if the court had seen the affidavits prior to or at the [initial] hearing they would have been insufficient [and] *** should have been stricken." The record does not indicate the affidavits were stricken. Nonetheless, the affidavits were deficient. As this court has noted: "[A]n affidavit in which the affiant avers that he spoke to some persons who claimed they went to the defendant's home does not show that the affiant has personal knowledge of an attempt to serve the defendant at home. *Deutsche Bank Nat. Trust Co. v. Brewer*, 2012 IL App (1st) 111213, ¶ 23 (2012). Plaintiffs failed to demonstrate that their activities justified the delay in service.

¶ 26 The third factor, plaintiffs' knowledge of defendant's location, also weighs in favor of

defendant. Her correct address was listed on her driver's license and the April 18, 2008 police report. The summons that was issued and placed with the Cook County sheriff's office on October 31, 2008 also correctly listed defendant's address of 1908 Marina Drive, Normal, Illinois, 61761. Defendant was eventually served at that address. Thus, plaintiffs had knowledge of defendant's location.

¶ 27 As to the fourth factor, the ease with which defendant's whereabouts could be ascertained, she has maintained this permanent address in Normal, Illinois since August 2004 and has resided there since the spring of 2008, and family members also reside there and could have accepted service on her behalf and, in fact, did so after the case was refiled. This factor weighs in favor of defendant.

¶ 28 The record contains no evidence regarding the fifth or sixth factor. The seventh factor is actual service on defendant. Although defendant was served, she was served eight months after the statute of limitations expired.

¶ 29 Overall, the *Segal* factors weigh in favor of granting defendant's motion to dismiss pursuant to Rule 103(b). The trial court did not abuse its discretion in granting defendant's motion to dismiss the action.

¶ 30 We recognize that dismissal of a case under Rule 103(b) is always a harsh result. Nonetheless, "although controversies should ordinarily be resolved on their merits after both sides have had their day in court, a plaintiff may not complain where the dismissal resulted from his own lack of diligence in effectuating service." *Christian v. Lincoln Automotive Co.*, 403 Ill. App. 3d 1038, 1042 (2010) (holding that the public policy factor favoring adjudication of

controversies on the merits is not an appropriate factor for consideration in objectively determining whether the plaintiff exercised reasonable diligence to obtain service on the defendant). Based on the totality of the circumstances, where plaintiffs failed to show what efforts were undertaken to serve defendant, we cannot say that the trial court abused its discretion in dismissing this case.

¶ 31 CONCLUSION

¶ 32 In view of the foregoing, we affirm the decision of the circuit court of Cook County granting defendant's motion for reconsideration and dismissing plaintiffs' complaint pursuant to Supreme Court Rule 103(b).

¶ 33 Affirmed.