

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).

2014 IL App (4th) 130828-U

NO. 4-13-0828

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

June 13, 2014

Carla Bender

4th District Appellate

Court, IL

ROBERT T. SMITH,)	Appeal from
Plaintiff-Appellant,)	Circuit Court of
v.)	McLean County
ROAD AND RAIL SERVICES, INC.,)	No. 12L103
Defendant-Appellee.)	
)	Honorable
)	Rebecca Simmons Foley,
)	Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Presiding Justice Appleton and Justice Steigmann concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court affirmed, concluding the trial court did not abuse its discretion by dismissing plaintiff's complaint due to plaintiff's failure to exercise reasonable diligence in effecting service.

¶ 2 In July 2012, plaintiff, Robert T. Smith, filed a complaint against defendant, Road and Rail Services, Inc., pursuant to the Workers' Compensation Act (820 ILCS 305/1 to 30 (West 2006)). Approximately nine months later, in April 2013, plaintiff issued a summons. In May 2013, defendant filed a motion to dismiss, asserting, in part, plaintiff failed to exercise reasonable diligence in bringing the claims pursuant to Illinois Supreme Court Rule 103 (eff. July 1, 2007). In August 2013, the trial court granted defendant's motion to dismiss.

¶ 3 Plaintiff appeals, arguing the trial court erred by dismissing his complaint. Because we conclude the court's dismissal was proper based on plaintiff's failure to exercise reasonable diligence under Rule 103(b), we affirm.

¶ 4

I. BACKGROUND

¶ 5 On July 24, 2012, plaintiff filed a complaint against defendant, claiming defendant's July 24, 2007, termination of plaintiff's employment violated the Workers' Compensation Act (820 ILCS 305/1 to 30 (West 2006)). At the time plaintiff filed the complaint, he failed to issue a summons.

¶ 6 In December 2012, without leave of court, plaintiff filed an amended complaint, asserting an additional claim that defendant improperly denied his unemployment benefits. Plaintiff attached a certificate of service indicating he mailed a copy of his amended complaint to defendants. Again, plaintiff failed to issue a summons.

¶ 7 In April 2013, again without leave of court, plaintiff filed a second amended complaint, adding a claim for breach of contract. Plaintiff then issued a summons for the first time. Defendant concedes it received a copy of the summons later that month.

¶ 8 In June 2013, defendant filed a motion to dismiss pursuant to Illinois Supreme Court Rule 103 (eff. July 1, 2007) or, in the alternative, pursuant to sections 2-615 and 2-619 of the Code of Civil Procedure (735 ILCS 5/2-615, 2-619 (West 2012)). Defendant argued, in part, that plaintiff's case should be dismissed for failure to exercise reasonable diligence pursuant to Illinois Supreme Court Rule 103(b) (eff. July 1, 2007). Defendant attached an affidavit to the motion stating defendant maintained its principal address in Kentucky and that defendant did not attempt to avoid service. In July 2013, plaintiff responded, asserting, (1) defendant had been on notice of the claim since plaintiff filed the initial complaint in July 2012; (2) defendant could have filed an appearance in the case without receiving a summons; and (3) plaintiff's failure to issue a summons until April 2013 was not intentional.

¶ 9 In August 2013, after a hearing on defendant's motion to dismiss, the trial court dismissed plaintiff's complaint with prejudice pursuant to Illinois Supreme Court Rule 103(b) (eff. July 1, 2007).

¶ 10 This appeal followed.

¶ 11 II. ANALYSIS

¶ 12 On appeal, plaintiff addresses the substantive merits of his complaint. However, as defendant notes, our review is limited to whether the trial court erred in dismissing the complaint due to plaintiff's failure to exercise reasonable diligence under Illinois Supreme Court Rule 103(b) (eff. July 1, 2007).

¶ 13 In his brief, plaintiff fails to directly address whether the trial court erred in dismissing his claim pursuant to Rule 103(b); rather, plaintiff only raises the issue in his reply brief. Typically, issues "not clearly defined and sufficiently presented" on appeal are deemed forfeited. *Bublitz v. Wilkins Buick, Mazda, Suzuki, Inc.*, 377 Ill. App. 3d 781, 787, 881 N.E.2d 375, 381 (2007). However, forfeiture "is a limitation on the parties and not the reviewing court"; therefore, "this court may overlook forfeiture where necessary to obtain a just result or maintain a sound body of precedent." *Wilson v. Humana Hospital*, 399 Ill. App. 3d 751, 757, 926 N.E.2d 821, 827-28 (2010). We conclude it is appropriate in this instance to overlook plaintiff's forfeiture of this issue.

¶ 14 Illinois Supreme Court Rule 103(b) (eff. July 1, 2007) states, in part, "[i]f 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." Rule 103(b) further states, "[i]n considering the exercise of reasonable diligence, the court shall review the totality of the circumstances." Il. S. Ct. R. 103(b) (eff. July 1, 2007). The

purpose of the rule is "to protect a defendant from unnecessary delay in the service of process and to prevent the plaintiff from circumventing the applicable statute of limitations by filing suit before the expiration of the limitations period but taking no action to have defendants served until the plaintiff is ready to proceed with the litigation." *Christian v. Lincoln Automotive Co.*, 403 Ill. App. 3d 1038, 1042, 934 N.E.2d 1065, 1068 (2010).

¶ 15 The trial court may consider several factors in considering a Rule 103(b) motion to dismiss, 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 that would affect plaintiff's efforts," and (7) "actual service on defendant." *Id.* at 1042-43, 934 N.E.2d at 1069. The initial burden is on the defendant to establish *prima facie* evidence that the plaintiff has failed to exercise due diligence. *Wilk v. Wilmorite, Inc.*, 349 Ill. App. 3d 880, 887, 812 N.E.2d 765, 771 (2004). The court must evaluate on a case-by-case basis whether the defendant has presented *prima facie* evidence to support its contention that plaintiff has failed to exercise reasonable diligence. *Kole v. Brubaker*, 325 Ill. App. 3d 944, 949, 759 N.E.2d 129, 133 (2001).

¶ 16 Once the trial court finds the defendant has presented *prima facie* evidence that the plaintiff has failed to exercise due diligence, "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, 759 N.E.2d at 134. We will not overturn the court's decision to dismiss a claim for lack of reasonable diligence pursuant to Rule 103 absent an abuse of discretion. *Christian*, 403 Ill. App.

3d at 1044, 934 N.E.2d at 1070. "An abuse of discretion occurs when a ruling is 'so arbitrary, fanciful, or unreasonable that no reasonable person would take the view it adopted.'" *Id.* (quoting *People v. Lisle*, 376 Ill. App. 3d 67, 78, 877 N.E.2d 119, 129 (2007)).

¶ 17 With regard to the first factor, which focuses on the length of time between the filing of the complaint and serving of the summons, we note plaintiff filed his complaint in June 2012, the last day of the five-year statute of limitations for filing workers' compensation claims. 735 ILCS 5/13-205 (West 2006); *Henon v. Lenon Brothers Co.*, 114 Ill. App. 3d 608, 610-11, 449 N.E.2d 196, 197 (1983). He then failed to issue a summons in the case until April 2013, approximately nine months after filing the original petition. Moreover, plaintiff offers no explanation to satisfactorily justify his delay. Though we review whether a plaintiff has been reasonably diligent on a case-by-case basis, other similar cases are instructive. A delay of five to seven months appears to be the minimum delay required to demonstrate *prima facie* lack of reasonable diligence. See *Verploegh v. Gagliano*, 396 Ill. App. 3d 1041, 1046, 922 N.E.2d 428, 432 (2009). In *Womick v. Jackson County Nursing Home*, 137 Ill. 2d 371, 561 N.E.2d 25 (1990), the supreme court affirmed the trial court's dismissal of a complaint pursuant to Rule 103 where the plaintiff waited approximately nine months after the expiration of the statute of limitations to issue a summons, and then offered no explanation for his delay. Similarly, in *Sinn v. Elmhurst Medical Building, Ltd.*, 243 Ill. App. 3d 787, 612 N.E.2d 932 (1993), the Second District concluded the trial court properly dismissed the case after the plaintiff made no attempts at summons for eight months. These cases demonstrate a lengthy delay without explanation constitutes a lack of reasonable diligence. Thus, it is appropriate to construe the first factor in defendant's favor.

¶ 18 As to the second factor, the uncontradicted evidence reveals plaintiff made no attempt to serve a summons on defendant prior to April 2013. Though plaintiff mailed a copy of the amended complaint to defendant, mailing a copy of the complaint alone is not sufficient to overcome the need for a court summons. See *Polites*, 361 Ill. App. 3d 76, 86, 836 N.E.2d 133, 142 (2005) ("That the defendant had notice of the lawsuit before being served did not preclude dismissal under Rule 103(b)."). Thus, the facts support the decision to construe the second factor in defendant's favor.

¶ 19 The facts also support the decision to construe the third factor in defendant's favor. Plaintiff's filings clearly indicate knowledge of defendant's location; in fact, plaintiff mailed at least one version of the complaint to defendant prior to issuing the summons. Likewise, because plaintiff knew defendant's location, it stands to reason defendant's whereabouts would have been easy to ascertain, thus satisfying the fourth factor. We note defendant received the summons immediately after plaintiff issued it in April 2013, which further demonstrates the ease with which plaintiff could have effected service.

¶ 20 With respect to the fifth factor, the focus is on defendant's knowledge of the pending action. Our review of the record shows plaintiff first filed a certificate of service with his December 2012 amended complaint, which would have provided notice to defendant approximately five months after plaintiff filed the initial complaint. Thus, even if defendant learned of the action when plaintiff mailed the first amended petition, defendant still failed to justify a five-month delay in providing notice. Contrary to plaintiff's assertion, the record contains no evidence to suggest defendant knew of the originally filed complaint. Regardless, even if defendant received a copy of the original complaint in July 2012, we again note

defendant's notice of the lawsuit prior to being served with a summons did not necessarily preclude dismissal pursuant to Rule 103(b). *Id.*

¶ 21 Plaintiff fails to demonstrate any special circumstances that affected his efforts to obtain service other than his acknowledgment that he "made mistakes" due to his lack of representation, which is an insufficient basis for his failure to follow procedural rules. See *Steinbrecher v. Steinbrecher*, 197 Ill. 2d 514, 528, 759 N.E.2d 509, 517 (2001) ("*Pro se* litigants are presumed to have full knowledge of applicable court rules and procedures, including procedural deadlines."). Thus, the sixth factor also weighs in defendant's favor.

¶ 22 Finally, as to the seventh factor, plaintiff served defendant with summons in April 2013, nine months after filing the original complaint. This demonstrates actual service on defendant.

¶ 23 In reviewing all the factors, which heavily favor defendant, and considering the totality of the circumstances, we cannot conclude the trial court's decision was so arbitrary, fanciful, or unreasonable that no reasonable person would adopt the court's view. Therefore, we hold the court did not abuse its discretion by (1) finding plaintiff failed to exercise due diligence in waiting nine months after the expiration of the statute of limitations to issue a summons and (2) dismissing the complaint with prejudice in accordance with Illinois Supreme Court Rule 103(b) (eff. July 1, 2007).

¶ 24 III. CONCLUSION

¶ 25 For the foregoing reasons, we affirm the trial court's judgment.

¶ 26 Affirmed.