

**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS  
COUNTY DEPARTMENT, LAW DIVISION**

Bobby Booth, )

Plaintiff, )

v. )

Ruth A. Millsap, Monique Adams, )  
Jacqueline Cobbs, Alice M. Hicks, )  
Willie T. Burgess, Joanne Robert A. )  
Brown-Hicks, )

Defendants. )

No. 19 L 5355

**MEMORANDUM OPINION AND ORDER**

Illinois Supreme Court Rule 103(b) authorizes the dismissal of a defendant if the plaintiff failed to exercise reasonable diligence to obtain service of process after the statute of limitations expired. In this case, it took the plaintiff just over seven months after the statute expired to serve the defendant. There is, however, no indication that the plaintiff failed to exercise reasonable diligence; therefore, the defendant's motion to dismiss must be denied.

Facts

On June 3, 2017, Bobby Booth stepped on a mat covering a hole on a private sidewalk located at 7904 South Kimbark Avenue in Chicago. Booth fell and was injured. On May 17, 2019, Booth filed a complaint against the defendants, including Willie Burgess, alleging that one or more of them owned or controlled the sidewalk. On February 6, 2020, Burgess filed a motion to dismiss the complaint based on delayed service of process after the statute of limitations had expired. See Ill. S. Ct. R. 103(b).

Since the parties' arguments are heavily date dependent, a simple timeline will suffice to present most of the relevant facts:

- 5/17/19 Lawsuit filed; summons issued and placed with Cook County sheriff for service of "Willie Burger" with a West Chicago (DuPage County) address
- 6/3/19 Statute of limitations expired
- 7/18/19 Court order for alias summons to issue, and Affordable Investigations (John Ott) named as special process server
- 7/25/19 Alias summons issued for service on "Willie Burger," with a West Chicago address, and placed with Ott
- 8/9/19 Cook County Sheriff filed affidavit of unserved process on "Willie Burger"
- 8/25/19 Court order for alias to issue and appointing, once again, Affordable Investigations (Ott) as special process server
- 9/17/19 Court order for alias summons to issue
- 9/27/19 Alias summons issued for service on "Willie Burger," with a West Chicago address, and placed with Ott
- 11/5/19 Court order appointed ATG as special process server
- 11/8/19 First amended complaint filed
- 11/14/19 Alias summons issued for service on "Willie Burger," with a West Chicago address, and placed with ATG.
- 12/9/19 ATG conducts skip trace and locates Willie Burgess with a West Rice Street address in Chicago
- 1/7/20 Court order appointed ATG as special process server
- 1/8/20 Alias summons issued for service on Willie Burgess, with a West Rice Street address, in Chicago
- 1/13/20 Service on Burgess

In response to Burgess's motion to dismiss, Booth presents two affidavits, one by David Gorodess, one of Booth's attorneys, and a ~~second by Carmel Loizon, a paralegal who works with Gorodess.~~ Both affidavits aver that neither of the affiants knew at the time they placed the alias summons with Ott for service of process that he was extremely ill and was not conducting investigations, including skip tracing or attempting to serve process. The affidavits also aver that Ott did not tell the affiants otherwise.

## Analysis

Illinois courts have likened a motion to dismiss pursuant to Illinois Supreme Court Rule 103(b) to a dismissal pursuant to section 2-619(a)(5), which authorizes a dismissal because the action was not commenced within the time limited by law. *See Smith v. Menold Constr., Inc.*, 348 Ill. App. 3d 1051, 1057 (4th Dist. 2004). Rule 103(b) specifically provides that:

[i]f the plaintiff fails to exercise reasonable diligence to obtain service prior to the expiration of the applicable statute of limitations, the action as a whole or as to any unserved defendant may be dismissed without prejudice. If the failure to exercise reasonable diligence to obtain service occurs after the expiration of the applicable statute of limitations, the dismissal shall be with prejudice. In either case the dismissal may be made on the application of any defendant or on the court's own motion.

Ill. S. Ct. R. 103(b). "The purpose of Rule 103(b) is to protect defendants from unnecessary delay in the service of process on them and to prevent the circumvention of the statute of limitations." *Segal v. Sacco*, 136 Ill. 2d 282, 286 (1990). At the same time, a Rule 103(b) dismissal is considered, "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 liability against [the defendant] is predicated while the facts are accessible.'" *Id.* at 288 (quoting *Geneva Constr. Co. v. Martin Transfer & Storage Co.*, 4 Ill. 2d 273, 289-90 (1954)).

Courts are to employ a burden shifting mechanism to adjudicate a motion to dismiss under Rule 103(b). The defendant-movant is first required to make a *prima facie* showing that, after filing suit, the plaintiff failed to exercise reasonable diligence in serving the defendant. *See Kole v. Brubaker*, 325 Ill. App. 3d 944, 949 (1st Dist. 2001) (citing *Martin v. Lozada*, 23 Ill. App. 3d 8, 11 (1st Dist. 1974); Robert A. Michael, Illinois Practice, Civil Procedure, § 8.7 at 93 (1989)). To judge what constitutes a *prima facie* case, a court is to

consider the record to see if it reveals “unusual circumstances that would have prevented or otherwise hindered plaintiff’s ability to serve defendants. . . .” *Id.* Absent any unusual circumstances, the burden then 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.* (citing *Segal*, 136 Ill. 2d at 286; *Kreykes Electric, Inc. v. Malk & Harris*, 297 Ill. App. 3d 936, 940 (1st Dist. 1998); *Tischer v. Jordan*, 269 Ill. App. 3d 301, 307 (1st Dist. 1995); Robert A. Michael, Illinois Practice, Civil Procedure, § 8.7 at 92, 95 (1989)). There exists no absolute time frame that shifts the burden to the plaintiff; rather, the inquiry is made on a case-by-case basis. *Id.* (citing Robert A. Michael, Illinois Practice, Civil Procedure, § 8.7 at 33 (Supp. 2000)).

Based on the record provided, Burgess has failed to make a *prima facie* showing of Booth’s unreasonable lack of diligence. The uncontested record shows that it took eight months to serve Burgess after the filing of the original complaint, seven months after the statute of limitations expired. Yet Booth attached various exhibits to explain why service took such a long time. A substantial delay – from July 18 until November 5, 2019 – occurred because the summons and complaint sat with Ott, who was, according to the affidavits, too ill to conduct a skip trace, let alone serve process. Booth’s attorneys did not know of Ott’s medical condition, and Ott is seriously at fault for not telling them. It did not matter that Ott had been given the “Willie Burger” name and a bad address because Ott did not conduct a skip trace or attempt service on anyone, let alone the wrong “Willie Burger.” Absent Ott’s highly unprofessional conduct, service could have been had months earlier.

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Alternatively, if an eight-month period of time, alone, suggests a lack of diligence, the burden then shifts to Booth to provide a satisfactory explanation for the delay in service. *See Emrikson v. Morfin*, 2012 IL App (1st) 111687, ¶ 17. The standard employed in such an analysis is not based on the plaintiff’s subjective intent, but on an objective analysis of reasonable diligence in effectuating service. *See Kole*, 325 Ill. App. 3d at 950. There exists no exclusive

list of factors to be considered, but the following have been recognized as significant: (1) length of time to obtain service; (2) plaintiff's activities; (3) plaintiff's knowledge of the defendant's location; (4) ease with which defendant's whereabouts could have been ascertained; (5) actual knowledge on the part of the defendant of the pendency of the action as a result of ineffective service; (6) special circumstances that would affect plaintiff's efforts; and (7) actual service. *See Segal*, 136 Ill. 2d at 287 (1990). These factors are to be considered in light of the purpose of Rule 103(b). *See id.*

The timeline presented above shows that it took just short of eight months to obtain service on Burgess. That is, by itself, a reasonably long time to obtain service. During that time, however, Booth attempted to serve through the Cook County sheriff and obtained three separate alias summonses. In other words, Booth had not forgotten or given up on service, but was actively attempting to obtain it. The fundamental problem was that Booth was using a wrong name – Willie Burger – which, not surprisingly, turned up an incorrect address in West Chicago, DuPage County. That error is no excuse for careful matching of names between a complaint and summons, a seemingly incidental but, nonetheless, critical task. The error was, however, just that – an error – that is as unfortunate as it is not unusual.

Yet as noted above, the name error was not the fundamental problem Booth faced; rather, it was Ott, who failed to attempt service or conduct a skip trace for either the incorrect “Willie Burger” or the correct Willie Burgess. Had Ott informed Booth's attorneys that Ott was not performing any services during his illness, a different alias could have been issued and service obtained quickly. This is evident once ATG received the complaint and summons for service. The time between ATG's skip trace, Booth filing a motion for an alias, issuance of a court order, placement of the complaint and summons with ATG, and service on Willie Burgess took only 34 days.

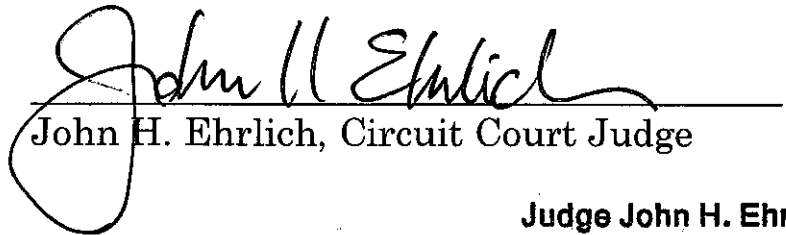
The delay caused by Booth's attorney's use of a wrong name certainly calls out for better coordination and quicker follow up between attorneys and process servers. That is not, however, a

sufficient basis to grant a Rule 103(b) motion to dismiss given that the ultimate goal is to give the defendant a fair opportunity to investigate the circumstances of the case. Given that standard, Burgess has not been prejudiced by the delay in service.

Conclusion

For the reasons presented above, it is ordered that:

1. Defendant Burgess's motion to dismiss is denied; and
2. This matter will next be heard for case management on a date to be scheduled by notification to the parties.

  
John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

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