

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

Pedro Favela,)	
)	
Plaintiff,)	
)	
v.)	No. 20 L 3624
)	
Just Joshing, LLC, Windy City Re, LLC,)	
MTD Property Management, Inc., and)	
McDonagh & Sons Plumbing & Sewer, Inc.,)	
)	
Defendants.)	

MEMORANDUM AND ORDER

Illinois Supreme Court Rule 103(b) authorizes the dismissal of a defendant if the plaintiff failed to use reasonable diligence in the service of process. Here, the defendants made a *prima facie* showing that the plaintiff's failure to serve the defendants for more than 16 months was a failure in exercising reasonable diligence. A review of relevant Rule 103(b) factors supports this conclusion. The defendant's motion to dismiss with prejudice is, therefore, granted.

Facts

On January 8, 2016, Pedro Favela slipped and fell at a Chicago apartment building. On December 15, 2017, Favela filed suit in case number 17 L 12811 for personal injuries allegedly sustained from that fall. On May 2, 2018, Windy City Re, LLC filed its appearance and on July 25, 2018, Just Joshing, LLC filed its appearance. On April 12, 2019, Favela voluntarily dismissed his case because an illness precluded his participation in discovery.

On March 26, 2020, Favela refiled his complaint in case number 20 L 3624. On March 22, 2021, another Law Division judge dismissed the case for want of prosecution. On April 23, 2021, Favela filed a

motion to reinstate, and on April 28, 2021, that judge granted Favela's motion. On May 13, 2021, the case was transferred to this court.

On July 7, 2021, Favela filed a motion to appoint a special process server to serve alias summonses on Windy City and Just Joshing. On July 27, 2021 the process server served both Windy City and Just Joshing. On August 6, 2021, counsel appeared for Windy City and Just Joshing and filed a motion to dismiss the complaint pursuant to Illinois Supreme Court Rule 103(b). The parties fully briefed the motion.

Analysis

Illinois Supreme Court Rule 103(b) authorizes the dismissal of a defendant because the plaintiff failed to exercise reasonable diligence in the service of process. Ill. S. Ct. R. 103(b). The rule provides, in part, that:

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 defendant 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.

Id.

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 “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)). To that end, the committee comments to the 2007 amendment to Rule 103(b) are significant. As provided:

the last sentence of Rule 103(b) addresses situations where the plaintiff has refiled a complaint under section 13–217 of the Code of Civil Procedure within one year of the case either being voluntarily dismissed pursuant to section 2–1009 or being dismissed for want of prosecution. If the statute of limitations has run prior to the plaintiff’s refiled complaint, the trial court has the discretion to dismiss the refiled case if the plaintiff failed to exercise reasonable diligence in obtaining service. The 2007 amendment applies the holding in *Martinez v. Erickson*, 127 Ill. 2d 112, 121-22 (1989), requiring a trial judge “to consider service after refiled in the light of the entire history of the case” including reasonable diligence by plaintiff after refiled.

Ill. S. Ct. R. 103(b) cmt. e (2007).

Courts are to employ a burden shifting mechanism to adjudicate a motion to dismiss under Rule 103(b). *Emrikson v. Morfin*, 2012 IL App (1st) 111687, ¶ 17. The defendant-movant is 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)). 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)). A defendant's knowledge of the lawsuit does not prevent a court from dismissing a case if, under all the circumstances, a plaintiff has failed to exercise reasonable diligence in effecting service. *Sullivan v. Nissen Trampoline Co.*, 82 Ill. App. 2d 1, 4 (1st Dist. 1967).

There exists no absolute time frame that automatically 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)). The standard employed in a burden-shifting analysis is not based on the plaintiff's subjective intent, but the objective analysis of reasonable diligence in attempting service. *See Kole*, 325 Ill. App. 3d at 950. Courts have recognized that a period of at least five to seven months between the filing of a complaint and subsequent service is generally required to establish a *prima facie* showing of a plaintiff's lack of diligence in serving process. *Verploegh v. Gagliano*, 396 Ill. App. 3d 1041, 1045 (3d Dist. 2009); *see also Long v. Elborno*, 376 Ill. App. 3d 970, 980 (1st Dist. 2007) (seven months shows lack of reasonable diligence); *Emrikson*, 2012 IL App (1st) 111687, ¶ 17 (same as to seven or 13 months); *Viking Dodge, Inc. v. Hofmann*, 161 Ill. App. 3d 186, 188 (3d Dist.) (service 16 months after statute of limitations expired showed lack of diligence); *Mosley v. Spears*, 126 Ill. App. 2d 35, 41-42 (1st Dist. 1970) (13 months showed lack of diligence). This simple calculation between filing and service of process is a low threshold, following the logic that a defendant may not know what the plaintiff has or has failed to do to effectuate service.

In this case, Favela re-filed his complaint on March 26, 2020 but did not service Windy City or Just Joshing with process until July 27, 2021. It is incontrovertible that a 16-month delay between the re-filing and the service of process is, by itself, a *prima facie* showing of a lack of diligence. Such a delay is substantially longer than the five-month period which has been held to constitute a *prima facie* case, *Verploegh*, 396 Ill. App. 3d 1041, 1045; *see also Long*, 376 Ill. App. 3d 970, 980, and approaches the 20-month period found unacceptable in *North Cicero Dodge, Inc. v. Victoria Feed Co.*, 151 Ill. App. 3d 860, 862 (3d Dist. 1987).

If a defendant shows the length of 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 reasonable explanation for the delay. *See Emrikson*, 2012 IL App (1st) 111687, ¶ 17. At that point, a court is to consider a non-exclusive list of factors that are 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.*

As to the first factor, Favela refiled his case on March 26, 2020 but did not effectuate service until July 27, 2021—16 months and one day later. Favela is correct that Rule 103(b) does not set a specific time limit within which a defendant must be served but, as explained above, 16 months is significantly longer than the five- to seven-month delay typically considered enough to establish a lack of reasonable diligence.

In addressing the second factor, Favela emphasizes particular circumstances of his counsel. Favela explains that his attorney failed to be diligent because of medical complications associated with his attorney contracting Covid-19 on January 19, 2021. Even if Covid-19 explains a seven-month delay between the onset of the virus and service of process on July 27, 2021, that delay does not explain the earlier nine-month delay in service from March 26, 2020—the day Favela re-filed his lawsuit—until January 19, 2021—the date his attorney contracted Covid-19. Though Covid-19 may explain for part of the delay in service, it does not excuse the lack of reasonable diligence.

Favela does not contest the third and fourth factors. Favela acknowledges that he knew the defendants' locations based on the

service of process he obtained in the 17 L 12811 case. Both of these factors also suggest a lack of reasonable diligence.

As to the fifth factor, Favela states he informed the defendants at the time of his voluntary dismissal of the 17 L 12811 case that he would likely re-file. Based on that statement, Favela argues the defendants knew a re-filing was imminent. Such an argument is unpersuasive. As noted above, a defendant's knowledge of a lawsuit does not excuse a failure to exercise reasonable diligence in effecting service based on all the circumstances. There is a substantial difference in Favela informing the defendants a re-filing would likely occur and the defendants' actual knowledge of the re-filing through proper service of process.

As to the sixth factor, Favela reiterates the special circumstances surrounding his attorney's contraction of Covid-19. This court is very sympathetic to the various setbacks that affected the courts and counsel because of the global pandemic, yet Favela waited six months following his contraction of the virus to effectuate service. While the Cook County sheriff had suspended process serving during part of that time, Favela certainly could have sought the appointment of a special process server under the circumstances. Again, this seven-month delay does not explain the earlier nine-month delay following the lawsuit's re-filing. Issuance of the alias summons on July 7, 2021 and actual service on July 27, 2021 strongly suggests that service of process could have been effectuated quickly in 2020 after Favela re-filed his case.

In sum, none of the factors demonstrates Favela's reasonable diligence in serving the defendants in this case. This conclusion is supported by the court's decision in *Billerbeck v. Caterpillar Tractor Co.*, 292 Ill. App. 3d 350 (4th Dist. 1997). In that case, Billerbeck filed suit on the last day permitted by the statute of limitations and then voluntarily dismissed her suit nearly four years later. *Id.* at 352. Billerbeck re-filed her lawsuit 11 months later, but did not effect service of process until 13 months and six days later; thus, Billerbeck circumvented the statute of limitations by more than six years. *Id.* As the court concluded: "[t]he purpose of Rule 103(b) is not served by such

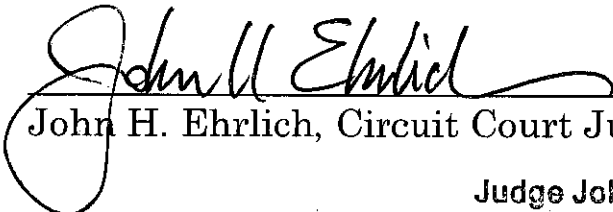
lack of diligence, and if we were to find this delay satisfies Rule 103(b), we would render the rule meaningless.” *Id.* at 356.

In this case, the statute of limitations on Favela’s cause of action ended on January 8, 2018. Yet Favela did not serve the defendants in this case until three-and-a-half years after the statute of limitations had expired. The purpose of Rule 103(b) is not served by excusing a lack of diligence in the service of process that occurred well beyond the statute of limitations.

Conclusion

For the reasons presented above, it is ordered that:

1. The motion to dismiss filed by Just Joshing, LLC and Windy City Re, LLC is granted;
2. Just Joshing, LLC and Windy City Re, LLC are dismissed with prejudice;
3. The case continues as to the remaining defendants; and
4. Based on Illinois Supreme Court Rule 304(a), there is no just reason to delay the enforcement or appeal, or both, of this court’s order.



John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

DEC 01 2021

Circuit Court 2075