

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

Geico Casualty Company, a Georgia corporation,)
as subrogee of Cora J. Suddoth Gore, an individual,)

Plaintiff,)

v.)

No. 20 L 1481

Lacy K. Curry, an individual,)

Defendant.)

MEMORANDUM OPINION AND ORDER

Illinois Supreme Court Rule 103(b) authorizes the dismissal of a complaint if the plaintiff fails to show reasonable diligence in attempting service of process and special circumstances justifying a delay in service. Here, the defendant made a *prima facie* showing of an unreasonable delay based on a 14-month delay in service that occurred eight months after the statute of limitations had expired. Since the plaintiff failed to supply a sufficient justification explaining the delay, the defendant's motion to dismiss is granted and the case is dismissed with prejudice.

Facts

This case arises out of an automobile accident that occurred on August 7, 2018. On February 5, 2020, Geico Casualty Company filed its complaint against Lacey Curry.¹ That same day, Geico placed a summons with the Cook County sheriff for service on Curry at Curry's home address. On February 27, 2020, the sheriff returned the summons as not served.

Geico's attorney, Michael S. Bain, averred that on March 20, 2020, he sought to verify Curry's last known address using in-house resources. Bain additionally averred that on June 12, 2020 he prepared an alias summons. Notably, Bain's affidavit incorrectly states the cause of action arose on February 22, 2011.

On June 29, 2020, Geico filed a motion to appoint a special process server. The motion was, however, deficient because it failed to include the process server's license number as required by law. *See* 735 ILCS 5/2-202(a-5). On July 2, 2020, Geico e-mailed the deficient motion and proposed order

¹ The caption misspells the defendant's name as "Lacy."

to the court for entry but failed to include the required notice of motion. The clerk e-mailed Geico within 15 minutes requesting the notice of motion. On July 27, 2020, Geico sent an unfiled notice of motion that failed to include the date, time, or manner for the hearing and the deficient motion to appoint a special process server.

On July 28, 2020, Geico, again, emailed the deficient motion and the filed but still incomplete notice of motion to the court. On August 12, 2020, Geico e-mailed the court for the entered order with the deficient motion and notice. On October 21, 2020, Geico, again, e-mailed the court for the entered order, and the court requested a completed notice that Geico refiled but failed to include the time of the hearing.

On December 30, 2020, Geico filed a proper notice of motion. Geico cured the motion to appoint a special process either by presenting a new version to the court, although there is no record of a newly filed motion in the docket, or by providing the license number in the proposed order. On January 6, 2021, Geico e-mailed courtesy copies of the re-filed motion to the court, and on January 12, 2021, the court entered an order appointing a special process server.

Bain averred that on February 23, 2021, he ran an additional in-house search to confirm Curry's address. He additionally averred that on March 31, 2021, he filed an alias summons and placed it with the special process server.

On April 11, 2021, Curry was personally served with the alias summons and complaint. On December 16, 2021, Curry filed an amended motion to dismiss. The parties fully briefed the motion.

Analysis

Illinois courts have likened a motion to dismiss pursuant to Illinois Supreme Court Rule 103(b)—authorizing a dismissal because the action was not commenced within the time limited by law—to a dismissal pursuant to section 2-619(a)(5). *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 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.

Ill. S. Ct. R. 103(b). The Supreme Court has explained that "[t]he 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)). "Five to seven months between filing and service of process seems to be the minimum delay generally needed to make a *prima facie* showing of failure to exercise reasonable diligence." *Verploegh v. Gagliano*, 396 Ill. App. 3d 1041,

1045 (3d Dist. 2009); *see also Long v. Elborn*, 376 Ill. App. 3d 970, 980 (1st Dist. 2007) (seven months between filing and service supports a finding of lack of reasonable diligence). As one court held: “regardless of whether 7 months or 13 months had elapsed before service occurred, the trial court did not abuse its discretion in finding that defendant successfully made a *prima facie* showing that plaintiff failed to timely execute service.” *Emrikson v. Morfin*, 2012 IL App (1st) 111687, ¶ 19.

After the burden has shifted to the plaintiff, the standard employed 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.*

Based on the record provided, Curry established a *prima facie* showing of Geico’s unreasonable lack of diligence. After Geico filed its complaint, it took 14 months to serve Curry, the last eight months were after the statute of limitations had expired. The record shows that Geico worked to effectuate service during those 14 months, yet, at the same time, Geico continued to file defective motions and notices. For example, Geico’s June 29, 2020 motion to appoint a special process server failed to include the special process server’s license number as required by law. 735 ILCS 5/2-202(a-5). On more than one occasion, Geico either forgot to include the required notice of motion or failed to file a completed notice of motion. Importantly, these defects to the motion and the notice of motion were not resolved until December 30, 2020. While this court is sympathetic to the setbacks parties such as Geico and their law firms faced with attempting service during the Covid-19 pandemic, Geico’s continued pleading errors arose from standard pleading and notice requirements that predated the pandemic.

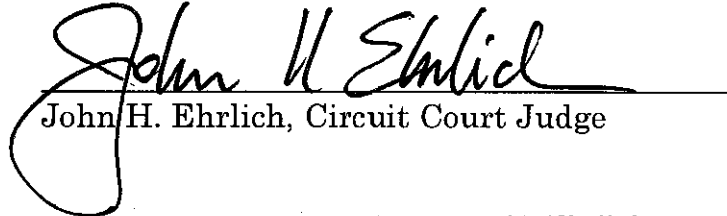
Since the 14-month period of time strongly suggests a lack of diligence, the burden shifts to Geico to provide a satisfactory explanation for the delay in service. *See Emrikson*, 2012 IL App (1st) 111687, ¶ 19. Notably, Geico failed to address explicitly the *Segal* factors and places the burden on the court to address them. Such an omission certainly appears to be another example of Geico’s improper pleading.

As noted above, the length of time to obtain service was unreasonable and Geico's attempts at court to obtain service were grounded on careless submissions of defective pleadings with months of delays. Geico certainly knew of Curry's location, as Geico correctly identified the address on the initial summons and where service was ultimately made on Curry. As Curry is a 95-year-old retired pastor who spends the majority of the time at his home, it could not have been challenging to ascertain his address. Geico was aware within the month that service had not been effectuated and should have known of its many subsequent inadequate filings to obtain service. Geico has not identified any special circumstances that hindered its efforts at service. Finally, actual service was effectuated 14 months after the filing of the original complaint at the initial address Geico had for Curry and eight months after the statute of limitations had expired. In sum, the totality of the circumstances in this case triggers application of Rule 103(b)—to protect defendants from unnecessary delays and receiving process after the statute of limitations has expired.

Conclusion

For the reasons presented above, it is ordered that:

1. Defendant's motion to dismiss is granted; and
2. This case is dismissed with prejudice.


John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

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