

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

Larry Ollins, Omar Muhammad,)	
Calvin Ollins, and Barcellia Bradford,)	
)	
Plaintiffs,)	
)	
v.)	No. 20 L 3676
)	
Peter Karl, Amazon.com Inc., and)	
Telemachus Press, LLC,)	
)	
Defendants.)	

MEMORANDUM OPINION AND ORDER

Illinois Supreme Court Rule 103(b) authorizes the dismissal of a complaint for lack of diligence in serving a defendant. In this case, the plaintiff did not serve one of the defendants for nearly one year after filing the complaint, nearly seven to eight months of which was through an unexcused lack of diligence. Given the unreasonable delay in serving the defendant, the defendant's motion to dismiss must be granted with prejudice.

Facts

On March 27, 2020, the plaintiffs filed their complaint against the defendants. On August 27, 2020, the plaintiffs issued for the first time a summons for service of process on defendant Peter Karl with the address of 100 North Collier Boulevard, #1002, Marco Island, Florida. Four days later, on August 31, 2020, the plaintiffs issued to Karl a waiver of service pursuant to the Code of Civil Procedure. *See* 735 ILCS 5/2-213. Karl did not respond to the waiver of service. On February 23, 2021, the plaintiffs issued for the first time an alias summons on Karl at the same Marco Island address. On March 2, 2021, a private detective achieved personal service on Karl at the Marco Island

and on March 5, 2021, the plaintiffs filed with the clerk the private detective's service affidavit.

On May 17, 2021, Karl filed a motion to dismiss pursuant to Illinois Supreme Court Rule 103(b). Ill. S. Ct. R. 103(b). According to Karl, a greater than 11-month delay in the service of process is a *prima facie* showing of the plaintiffs' lack of reasonable diligence in the service of process. On June 24, 2021, the plaintiffs responded by arguing that various extenuating circumstances excused the delay. Karl filed a reply brief.

Analysis

A lawsuit may be dismissed if the plaintiff fails to exercise reasonable diligence in serving the defendant. Ill. S. Ct. R. 103(b). As provided: “[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. . . .” *Id.* A circuit court is to review the totality of the circumstances in considering whether a plaintiff exercised reasonable diligence. *Id.*

Rule 103(b) does not identify a specific time period within which a defendant must be served. *Segal v. Sacco*, 136 Ill. 2d 282, 285 (1990). This period is, however, critical because a defendant must establish a *prima facie* case that the plaintiff was not reasonably diligent in serving the defendant after filing suit. *Kole v. Brubaker*, 325 Ill. App. 3d 944, 949 (1st Dist. 2001). Although there is no precise length of time that triggers a shift in the burden of proof, the defendant is required to establish 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. . . .” *Id.* at 949-50.

In this case, the question of whether Karl has presented a *prima facie* case is subject to a two-part temporal analysis. The first period runs from the filing of the complaint—March 27, 2020—through the issuance of the first summons—August 27,

2020. It is noted that the plaintiffs filed suit soon after the Circuit Court of Cook County had closed most functions on March 16, 2020 as a result of the Covid pandemic. It is understandable that parties, both plaintiffs and defendants, were initially confused as to how cases could or would proceed under, what were then, unusual circumstances. Yet it could not have taken five months for the plaintiffs to realize that the Cook County sheriff or a special process server would not be serving process on Karl, a Florida resident. Rather, it should have been obvious that service could be achieved through the Uniform Interstate Depositions and Discovery Act, which both Illinois and Florida had enacted. *See* 735 ILCS 35/1-8; Fla. Stat. § 92.251. In short, the Covid pandemic did not foreclose the plaintiffs' ability to serve Karl in Florida through the statutory mechanism at some point well before August 27, 2020.

The second time period runs from the date on which the plaintiffs attempted to obtain Karl's waiver of service—August 31, 2020—and the date of actual service—March 2, 2021. The waiver of service statute allows a defendant at least 30 days to respond to a request for waiver of service. 735 ILCS 5/2-213(a)(5). That would have given Karl until approximately the first week of October 2020 to return the waiver, which he did not do. The same section provides that if the defendant does not return the waiver of service, the plaintiff must serve the summons by some other means provided in the Code. 735 ILCS 5/2-213(e). At that point, it was, again, incumbent on the plaintiffs to find some alternative means of service. Yet the record shows the plaintiffs did nothing until February 23, 2021, when they issued a first alias summons on Karl, nearly five months after Karl had patently rejected service by waiver.

Given the initial Covid closure and the attempted waiver of service, this court disagrees with Karl that there was an 11-month unexcused period in the delay of service. It is, however, reasonable to conclude that a two- to three-month unexcused delay in the first time period coupled with a nearly five-month unexcused delay in the second time period equals a seven- to

eight-month period of time in which the plaintiffs were not actively seeking to serve Karl. Under the most generous of standards, that delay establishes a *prima facie* case of lack of diligence. See *Emrikson v. Morfin*, 2012 IL App (1st) 111687, ¶ 19 (five-month delay between complaint filing and service establishes *prima facie* showing of lack of diligence); *Verploegh v. Gagliano*, 396 Ill. App. 3d 1041, 1045 (3d Dist. 2009) (same); *Long v. Elborn*, 376 Ill. App. 3d 970, 980 (1st Dist. 2007) (seven-month delay shows lack of reasonable diligence).

Since Karl has established a *prima facie* case of the plaintiffs' lack of diligence, the burden of proof shifts to them "to demonstrate, by way of affidavit or other competent evidentiary materials, that reasonable diligence was exercised and that any delays in effecting service were justified." *Mular v. Ingram*, 2015 IL App (1st) 142439, ¶ 21 (citing *Kole*, 325 Ill. App. 3d at 949-50; *Emrikson*, 2012 IL App (1st) 111687, ¶ 17. Once the burden has shifted to the plaintiff, a court is to consider seven factors to determine whether a plaintiff acted with reasonable diligence:

- (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 which would affect plaintiff's efforts; and
- (7) actual service on defendant.

Segal, 136 Ill. 2d at 287.

As to the first and second factors, the plaintiffs actively and accurately sought to serve Karl by waiver of service for only one month out of an 11-month period of time. Even if two to three months are discounted on the front end because of the initial Covid closure of the courts, there still exists a seven- to eight-month period of time for which the plaintiffs provide no

reasonable explanation. Third and fourth, it is plain the plaintiffs knew of Karl's location because the same address is listed on both the original and alias summonses. Fifth, the plaintiffs offer no evidence that Karl knew this case was pending despite the ineffective service of process. Sixth, the special circumstances of the Covid closure have already been accounted for in finding there existed a *prima facie* case. It should be noted that the plaintiffs' arguments as to the publication dates of the alleged defamatory statements are entirely irrelevant because they have nothing to do with the lack of diligence in service of process after the filing of the plaintiffs' lawsuit. Seventh, the plaintiffs issued their first alias on February 23, 2021 and achieved personal service on Karl through a private investigator one week later, on March 2, 2021.

These seven factors convincingly establish that the plaintiffs failed to act diligently in attempting to achieve service of process on Karl. There is no question that, had the plaintiffs issued an alias summons from the start, service of process on Karl would have been achieved in a reasonable period of time, even with the court's initial closure because of the Covid pandemic. The seven-to-eight-month delay in service is, therefore, sufficient to support Karl's motion to dismiss based on Illinois Supreme Court Rule 103(b) because the plaintiffs have provided no reasonable excuse for their delay.

Conclusion

For the reasons presented above, it is ordered that:

1. Karl's motion to dismiss is granted;
2. Karl is dismissed with prejudice;
3. Pursuant to Illinois Supreme Court Rule 304(a), there exists no just reason for delaying either enforcement or appeal of this court's decision; and
4. The case continues as to the remaining defendants.

Judge John H. Ehrlich

SEP 02 2021

Circuit Court 2075


John H. Ehrlich, Circuit Court Judge