

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

Kathleen Spies and Alan Spies,)	
)	
Plaintiffs,)	
)	
v.)	20 L 8663
)	
Abdul Amine, M.D., individually, and)	
Abdul Amine, M.D., a service corporation,)	
Ebby Jido, M.D., Margarita Kos, N.P.,)	
Midwest Anesthesiologists, Ltd.,)	
Brandon Gaynor, M.D., Jeffrey Curtin, D.O.,)	
Joseph Kowalczyk, M.D., Vinson Uytana, M.D.,)	
Advocate Health & Hospitals Corporation, and)	
Medtronic, Inc.,)	
)	
Defendants.)	

MEMORANDUM OPINION AND ORDER

Illinois Supreme Court Rule 103(b) authorizes the dismissal of a case if the plaintiff has taken an unreasonable amount of time to serve the defendant after the statute of limitations has expired. The facts here do not support a dismissal on Rule 103(b) grounds; however, certain counts require dismissal for other reasons, as explained below.

Facts

On May 17, 2017, Dr. Abdul Amine surgically implanted an intrathecal pain pump into Kathleen Spies. The surgery occurred at a facility owned by Advocate Health & Hospitals Corporation. On May 25, 2017, Kathleen returned to Amine's office because of a cerebral spinal fluid leak where the pain pump had been inserted. On May 26, 2017, Amine conducted a second surgery to correct the leak. That surgery did not correct the leak, and Kathleen

continued to treat with various physicians until a May 2020 surgery by a different physician stopped the cerebral spinal fluid leak.

On April 25, 2018, the Spies' attorney, Peter Cantwell, sent a notice of attorney's lien to Advocate's registered agent. The lien letter states that the Spies had retained Cantwell to handle a claim for suit or collection. On December 6, 2018, Advocate responded to Cantwell's lien letter, advising him that Amine was an independent contractor not employed or insured by Advocate and, therefore, denied the Spies' claim.

On May 17, 2019, the Spies filed a complaint in case 19 L 5409 claiming, among other things, that Amine negligently failed to secure the catheter tubes, leading to a cerebral spinal fluid leak. In the 19 L 5409 suit, the Spies named Advocate as a respondent in discovery, but they never served Advocate with the complaint. On August 2, 2019, the Spies filed a motion to convert Advocate to a defendant and to file a first amended complaint; however, the Spies did not serve Advocate with the motion. On August 14, 2019, this court granted the motion, unaware that notice had not been provided. The Spies filed their first amended complaint, but voluntarily dismissed their case on August 15, 2019.

On August 17, 2020, the Spies re-filed their complaint under the current case number. The first amended complaint includes count 12, a cause of action against Advocate in *respondeat superior* based on Amine's conduct and that of other unidentified Advocate employees or agents. Count 24 is directed against Advocate in negligence based on Amine's conduct. Count 25 is also directed against unknown Advocate employees. On August 24, 2020, the Spies issued a summons on all defendants. On September 3, 2020 the sheriff served Advocate with the complaint. An Advocate representative avers that Advocate did not learn of the 2019 lawsuit until after the Spies served Advocate with the 2020 lawsuit.

Analysis

A lawsuit may be dismissed if the plaintiff fails to exercise reasonable diligence in serving the defendant. Ill. S. Ct. R. 103(b). “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. . . .” *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 state a specific time 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.

The Spies filed their original complaint on May 17, 2019 and then voluntarily dismissed their case on August 15, 2019, a 90-day period in which it is uncontested that the Spies failed to serve Advocate and, apparently, did nothing to attempt service. On August 17, 2020, the Spies re-filed their complaint under the current case number and achieved service on Advocate 17 days later, on September 3, 2020. Thus, the total elapsed time of the Spies’ inactivity amounts to 107 days, or approximately three-and-a-half months. This court is unaware of any case holding that a 107-day delay in service of process after the running of the statute of limitations constitutes a *prima facie* case of lack of diligence.

Even if 107 days were sufficient to establish a *prima facie* case and shift the burden to the Spies, there are additional legal and factual hurdles to be addressed. If a *prima facie* case has

been met, the law requires a court to consider seven factors when addressing a Rule 103(b) challenge:

- (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.

Id. at 287. This list is not exclusive, and a circuit court may consider other factors, including,

the defendant's knowledge of the lawsuit prior to the service of process, the lack of prejudice to the defendant, the plaintiff's efforts to obtain service through an alias summons, the occurrence of settlement negotiations during the period of the delay, and the plaintiff's full or timely use of all available resources for determining the defendant's whereabouts.

McRoberts v. Bridgestone Americas Holding, Inc., 365 Ill. App. 3d 1039, 1043 (5th Dist. 2006) (citations omitted).

A court is to consider each factor so as to further the goal of Rule 103(b), which 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*, 136 Ill. 2d at 286-87 (citing *Hanna v. Kelly*, 91 Ill. App. 3d 896, 900 (1st Dist. 1980), and *Galvan v. Morales*, 9 Ill. App. 3d 255, 258 (1st Dist. 1972)). To avoid the dismissal of a case, a plaintiff must show reasonable diligence in the service of process and must provide a reasonable explanation for any apparent lack of diligence. *McRoberts*, 365 Ill. App. 3d at 1043 (citing *Marks v. Rueben H. Donnelly, Inc.*, 260 Ill. App. 3d 1042, 1047 (1st Dist. 1994)). The decision to dismiss a complaint based on Rule 103(b) is within the

circuit court's sound discretion. *Segal*, 136 Ill. 2d at 286 (citing *Mosley v. Spears*, 126 Ill. App. 2d 35 (1st Dist. 1970)).

As to the first factor, it is true the Spies did nothing for a 90-day period to obtain service on Advocate in the 2019 lawsuit. Yet it took only 17 days from the filing of the 2020 lawsuit until the sheriff served Advocate. Second, the Spies failed to attempt service in the earlier case, but actively sought to obtain service in the re-filed case. Third and fourth, the Spies knew of Advocate's location, as evidenced by the Cantwell lien letter. Fifth, Advocate's corporate representative avers that it had no knowledge of the 2019 lawsuit until the filing of the 2020 lawsuit. That may be true, but it is also true that Advocate knew of the Spies' claim as early as April 2018 and acknowledged the claim in its December 4, 2018 letter to Cantwell denying Amine's employee status. Sixth, there are no special circumstances excusing the Spies' failure to obtain service in the 2019 lawsuit. Seven, the Spies obtained actual service on Advocate in only 17 days after the re-filing of the complaint in the 2020 case.

These factors do not favor a dismissal under Rule 103(b). The relatively short period of time to achieve service on Advocate coupled with Advocate's knowledge of the claim or suit as early as April 2018 supports the conclusion that the facts do not exist on which to grant a Rule 103(b) dismissal. That portion of Advocate's motion must be denied.

Advocate also seeks to dismiss the first amended complaint because counts 12, 24, and 25 fail to state proper claims and are duplicative. Count 12 is directed against Advocate in *respondeat superior* based on Amine's conduct and that of other Advocate employees or agents. Illinois prohibits the naming of fictional or unknown defendants, such as "Jane Doe," "John Doe," or "unknown employees." Complaints naming fictional or unknown defendants are nullities, do not stop the running of the statute of limitations, and should be dismissed under 735 ILCS 5/2-619(a)(9). *Bogseth v. Emmanuel*, 166 Ill. 2d 507, 513-14 (1995); *Hailey v. Interstate Mach. Co.*, 121 Ill. App. 3d 237, 238 (3rd Dist.

1984). To the extent that the Spies have identified particular employees whose conduct allegedly breached the standard of care, those persons must be identified in any subsequent re-pleading and an appropriate section 2-622 report provided. Count 12 is, therefore, dismissed without prejudice as to all non-identified Advocate employees.

Count 24 is directed against Advocate in negligence based on Amine's conduct. Illinois prohibits duplicative causes of action based on the same set of facts. *Neade v. Portes*, 193 Ill. 2d 433, 445 (2000). Count 24 is entirely duplicative of the *respondeat superior* claims the Spies present in count 12. Since count 24 is entirely duplicative, it must be dismissed with prejudice.

Count 25 is directed against unknown Advocate employees. For the same reasons presented above as to count 12, count 25 must also be dismissed without prejudice.

Conclusion


For the reasons presented above, it is ordered that:

1. Advocate's motion to dismiss the complaint based on Illinois Supreme Court Rule 103(b) is denied;
2. Advocate's motion to dismiss count 12 is granted without prejudice for the Spies to plead properly, if they can;
3. Advocate's motion to dismiss count 24 is granted with prejudice;
4. Advocate's motion to dismiss count 25 is granted without prejudice for the Spies to plead properly, if they can; and
5. The Spies have until September 22, 2021 to file an amended complaint.

Judge John H. Ehrlich

AUG 25 2021

Circuit Court 2075


John H. Ehrlich, Circuit Court Judge