

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

Cheryl Krauspe,)	
)	
Plaintiff,)	
)	
v.)	No. 19 L 2898
)	
Swiss International Air Lines, Ltd.,)	
)	
Defendant.)	

MEMORANDUM OPINION AND ORDER

Illinois Supreme Court Rule 103(b) authorizes the dismissal of a case based on an unreasonable delay in the service of process. The law-of-the-case doctrine bars relitigating an issue already decided in the same case. The Air Carrier Access Act prohibits discrimination by air carriers against disabled persons. In this case, a three-and-a-half-month delay in the service of process is insufficient to justify a dismissal of the plaintiff's complaint. In addition, some of the complaint's allegations and claims must be dismissed based on this court's prior ruling, while other claims cannot be dismissed because federal law does not displace them. The defendant's motion to dismiss is, therefore, granted in part with prejudice and denied in part.

Facts

On March 22, 2018, Cheryl Krauspe voluntarily dismissed without prejudice her case – 14 L 6701 – against Swiss International Air Lines, Ltd. pursuant to the Code of Civil Procedure. See 735 ILCS 5/2-1009. On March 18, 2019, Krauspe refiled her lawsuit, now identified as 19 L 2898. At the time of the refile, Krauspe did not issue a summons. On May 2 and 3, 2019, Krauspe issued two summonses for an address where Swiss does not have an office. Not surprisingly, neither summons was served.

On May 29, 2019, this court dismissed Krauspe's case for want of prosecution. On June 14, 2019, Krauspe filed a motion to vacate the dismissal, which this court granted on July 1, 2019. On July 31, 2019, this court entered an order for an alias summons and, on August 5, 2019, Krauspe perfected service of process on Swiss.

The complaint alleges that Swiss owned, operated, managed, maintained, and controlled a jet bridge at O'Hare Airport. After leaving an aircraft and walking on the jet bridge, Krauspe encountered numerous wheelchairs blocking her path. To avoid the wheelchairs, Krauspe stepped on a section of uneven flooring that caused her to trip and fall and injure herself. Based on these allegations, Krauspe claims that Swiss breached its duty of ordinary care by failing to: (a) manage and maintain the jet bridge; (b-c) warn of the uneven flooring and wheelchairs; (d) inspect for obstacles; (e) provide a safe means of egress; (f) remove the wheelchairs from the jet bridge; and (g-h) instruct the wheelchair attendants where to stand and to remove the wheelchairs from the path of deplaning passengers.

Analysis

I. Rule 103(b)

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)).

The record provided does not show any unusual circumstances in the refileing of the lawsuit or Krauspe's attempt to service Swiss. It took Krauspe exactly 20 weeks – 140 days, or four months and 18 days – to serve Swiss after refileing the complaint. While most Rule 103(b) cases address delays far longer than 140 days, *see, e.g., Womick v. Jackson Cnty. Nursing Home*, 137 Ill. 2d 371, 380-82 (1990) (nine-month delay); *Mular v. Ingram*, 2015 IL App (1st) 142439, ¶ 22 (one-year delay), there are a limited number of cases finding that substantially lesser delays may still justify the dismissal of a complaint. *See, e.g., Wilder Chiropractic, Inc. v. State Farm Fire & Cas. Co.*, 2014 IL App (2d) 130781 (four-month delay); *Kreykes*, 297 Ill. App. 3d 936 (five-month delay). The 140-day delay in this case puts it at the short end of the spectrum. Yet, given that there are no unusual circumstances in the record, it is reasonable to conclude that a *prima facie* case has been made based on Krauspe's lack of diligence.

The finding that Swiss has established a *prima facie* case means that the burden shifts to Krauspe 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.*

As noted above, it took Krauspe 140 days to effectuate service on Swiss. A summons and complaint were not issued at the time of the refileing, and it took 45 days – until May 2 – for Krauspe to issue a summons. In other words, Krauspe did nothing for a month and a

half. Even when summons did issue, Krauspe used an address where Swiss does not have an office. This error is unexplained since Swiss's registered agent had been served properly years before in the 14 L 6701 case and the address had not changed.

On May 29, 2019, this court dismissed Krauspe's case for want of prosecution (DWP). At that point, 72 days – two months and 12 days – had passed without service of process or, at a minimum, attempted service at a bad address. Once the DWP had been entered, service of Swiss could not go forward; indeed, service would have been invalid had it been perfected during this period because there was no case pending. On July 1, 2019, this court vacated the DWP, meaning that service of process could, once again, proceed. The period between May 29 to July 1, 2019 equals 33 days. It took Krauspe another 30 days, until July 31, 2019 to issue a correctly addressed summons, and then only five days after that, to August 5, 2019, to effectuate service.

In sum, there was an initial 72-day period of inactivity or attempted service at a bad address prior to the entry of the DWP. After the vacation of the DWP, there was an additional 35-day period to achieve service on Swiss. Those two time periods equals 107 days, or approximately three months and sixteen days from the date of the refiling to the date of actual service on Swiss.

The error in Swiss's calculation of Krauspe's delay centers on the 33-day period in which the case was DWP'd. That period cannot be counted against Krauspe because her case was not pending during that time. Had Krauspe obtained service during that time, Swiss would have properly brought a motion to quash. *See* 735 ILCS 5/2-301(a).

This court is unfamiliar with any case in which a court upheld the dismissal of a complaint under Rule 103(b) for a 107-day – three-and-a-half-month – delay of service of process. At the same time, Krauspe's delays in issuing summonses and failures to use a correct address certainly call for greater attention to detail by Krauspe's attorney. That inattention 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 principle, Krauspe has not been prejudiced by the delay in service, and the motion to dismiss based on Rule 103(b) must be denied.

II. Other Grounds

A. Paragraphs 1, 10, and 16(a)

The law-of-the-case doctrine bar relitigating issues already decided in the same case. *See In re Christopher K.*, 217 Ill. 2d 348, 365 (2005) (citing cases). The doctrine extends to issues of both law and fact. *See Radwill v. Manor Care of Westmont, IL, LLC*, 2013 IL App (2d) 120957, ¶ 8. The paragraphs identified above allege or claim that Swiss owned, operated, managed, maintained, or controlled the jet bridge where Krauspe was injured. This court addressed these identical allegations and claims in Swiss's previous summary judgment motion. This court ruled that, as a matter of fact and law, the jet bridge was owned by the City of Chicago. The City had, in turn, contracted with CICA Terminal Equipment Corporation to manage, maintain, operate, and control the jet bridges at O'Hare Airport pursuant to a valid contract between the two entities. There is nothing in the record to indicate that the factual predicate of this court's ruling has changed.

As a reminder, this court previously emphasized that the issue here is not who owned, managed, maintained, or controlled the jet bridge. Rather, the issue is whether Swiss's use of the jet bridge raised duties independent of ownership that Swiss owed to Krauspe. Krauspe's allegations and claims in these paragraphs go directly against this court's prior ruling; consequently, these paragraphs are dismissed with prejudice.

B. Paragraphs 16(c), (d), (f), (g), and (h)

Swiss argues that each of the claims contained in these subparagraphs conflicts with the Air Carrier Access Act of 1986 (ACAA). *See* 49 U.S.C. § 41705; 14 C.F.R. pt. 382. The ACAA

establishes, among other things, standards that air carriers must meet in a variety of circumstances, including the accessibility of airport facilities. Under the statute and its regulations, air carriers must ensure that passengers with disabilities can readily get between the place of boarding an aircraft and terminal facilities, which would include jet bridges.

Swiss presents two arguments based on the ACAA. First, Swiss argues that the noted subparagraphs' claims that Swiss breached various duties to warn and inspect violate "the requirements of the ACAA to provide the services in a dignified manner." Motion at 7. Second, Swiss argues that Krauspe's claims that Swiss employees failed to instruct wheelchair attendants where to wait for passengers and to remove wheelchairs from the path of passengers using the jet bridge conflict with the ACAA.

Neither of these arguments is supported by the ACAA or its regulations. First, Swiss fails to cite to a case or regulation indicating that the ACAA displaces an air carrier's common law duties. *See Gilstrap v. United Air Lines, Inc.*, 709 F.3d 995, 1008 (9th Cir. 2013) (ACAA does not preempt state remedies unless they conflict with federal law) (citing *Cipollone v. Liggett Group Inc.*, 505 U.S. 504, 516 (1992)). Second, there is no indication that the ACAA applies to persons who are not disabled, such as Krauspe. *See Segalman v. Southwest Airlines Co.*, 895 F.3d 1219, 1221 (9th Cir. 2018) (ACAA prohibits air carriers from discriminating against persons based on physical or mental impairment). Swiss's arguments based on the ACAA are not well taken and, therefore, its motion to dismiss subparagraphs 16(c), (d), (f), (g), and (h) must be denied.

Conclusion

For the reasons presented above, it is ordered that:

1. Swiss's motion to dismiss based on Illinois Supreme Court Rule 103(b) is denied;
2. Swiss's motion to dismiss paragraphs 1, 10, and 16(a) of the complaint is granted with prejudice;

3. Swiss's motion to dismiss subparagraphs 16(c), (d), (f), (g), and (h) is denied; and
4. 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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Circuit Court 2075