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

Makeattia McNeal,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
Clark Brands, LLC, a foreign corporation, Texor Petroleum, a foreign corporation, World Fuel Services, Inc., d/b/a Texor Petroleum, a foreign corporation, and LAXMI 12, Inc., a domestic corporation,	)	No. 19 L 8174
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Illinois Supreme Court Rule 103(b) authorizes a defendant's dismissal if the plaintiff fails to exercise reasonable diligence to obtain service of process after the statute of limitations expires. The plaintiff's service on two defendants in this case took remarkably different lengths of time in a highly confusing series of three lawsuits filed by two plaintiff's attorneys before two different judges. Despite the plaintiff's substantial procedural errors, the defendants' motion to dismiss must be denied.

Facts

On August 18, 2016, Makeattia McNeal tripped and fell over a box allegedly left in a walkway at 733 East 142nd Street in Dolton, Illinois. The property is owned or operated by defendants Clark Brands, LLC and World Fuel Services, Inc. McNeal filed complaints against these and other defendants at three different times. Since the parties' arguments are heavily date dependent and inextricably tied to particular events in each lawsuit, a

timeline for each case will assist in the presentation of the relevant facts:

Lawsuit 18 L 8418 – Judge John H. Ehrlich

8/6/18	McNeal files suit (by attorney Jacquelyn Fernandez Leyva); summons placed with sheriff
10/4/18	Court appoints special process server
10/17/18	Court grants leave to serve Clark Brands by special process server
11/15/18	Court grants leave to issue second alias summons for Texor Petroleum and Clark Brands
3/5/19	McNeal files first amended complaint
3/7-28/19	Alias summonses issued
4/1/19	McNeal files second amended complaint
4/9/19	Clark Brands served
4/10/19	World Fuel served
5/8/19	Clark Brands and World Fuel file appearance
6/28/19	McNeal voluntarily dismisses 18 L 8418
8/16/19	Alias summonses issued for Clark Brands and World Fuel

Lawsuit 18 L 8953 – Judge Brendan A. O'Brien

8/17/18	McNeal files suit (by attorney Jacquelyn Fernandez Leyva); summons placed with sheriff
8/27/18	World Fuel Services served
8/28/18	Clark Brands summons returned unserved
10/17/18	Alias summons issued for Clark Brands
11/27/18	Court dismisses case for want of prosecution (DWP)
12/13/18	Clark Brands served

Lawsuit 19 L 8174 – Judge John H. Ehrlich

7/24/19	McNeal re-files suit (by attorney John Bickley); summons placed with sheriff
8/20/19	World Fuel and Clark Brands improperly served with new summons in 18 L 8418 case but attaching 19 L 8174 complaint
9/17/19	Affidavit for alias summons on Clark Brands filed misstating case as 18 L 8418

10/17/19	McNeal sends to World Fuel and Clark Brands special process server affidavits of service; World Fuel's attorney e-mails McNeal's attorney indicating that appearance will follow and asking for an extension of time to answer or otherwise plead
1/7/20	McNeal's attorney contacts World Fuel's attorney asking for status
1/22/20	Alias summonses issued
1/22/20	World Fuel's attorney contacts McNeal's attorney and indicates problem with the case number on the summons; indicates that he will not be appearing in the case
1/28/20	World Fuel served in 19 L 8174
1/30/20	Clark Brands served in 19 L 8174

On February 11, 2020, Clark Brands and World Fuel filed a motion to dismiss the complaint filed in 19 L 8174. The defendants argue that they were not served until more than 3½ years after McNeal's accident and 17 months after she filed 18 L 8953 and served them with correct process. McNeal filed a response brief and the defendants filed a reply.

Analysis

Illinois courts have likened a motion to dismiss pursuant to Illinois Supreme Court Rule 103(b) to a motion to dismiss pursuant to Code of Civil Procedure 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); Ill. S. Ct. R. 103(b); 735 ILCS 5/2-619(a)(5). Rule 103(b) specifically provides that:

> If 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, with the right to refile if the statute of limitation has not run. 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.

Ill. S. Ct. R. 103(b) (amended June 5, 2007, eff. July 1, 2007). The committee comments accompanying the rule's 2007 amendment underscore the Supreme Court's intention when it added the new, last sentence to the rule. As the committee explained:

> 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 request to refile the 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 refiling in the light of the entire history of the case" including reasonable diligence by plaintiff after refiling.

Ill. S. Ct. R. 103(b) (2007 cmts.). 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)).

To adjudicate a motion to dismiss under Rule 103(b), courts employ a burden shifting mechanism. 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 supports the conclusion that the defendants have successfully established a *prima facie* showing of McNeal's unreasonable lack of diligence. On August 6, 2018, McNeal filed her first case – 18 L 8418 – but it took until April 9 and 10, 2019 to serve Clark Brands and World Fuel. McNeal provides no

explanation as to why it took so long to serve the defendants. In her third case – 19 L 8174 – it took McNeal an additional six months to serve Clark Brands and World Fuel properly. As explained further below, there are extenuating circumstances as to the delay in service in the current case.

Since either an eight-month or a 14-month delay in service suggests an unreasonable lack of diligence, the burden shifts to McNeal to provide a satisfactory explanation for the delays. *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.*

Before addressing the *Segal* factors, this court needs to address the shiny object that has averted the parties' attention from the central issues in this case. It is quite evident that McNeal's second case – 18 L 8953 – is wholly irrelevant to an analysis under Rule 103(b). McNeal plainly filed the lawsuit in error only eleven days after filing her first. And while McNeal achieved valid service on World Fuel in the second case, she failed to achieve service on Clark Brands until after Judge O'Brien had issued a DWP order, making the service on Clark Brands invalid. Thus, the real issues in this Rule 103(b) analysis are: (1) both Clark Brands and World Fuel were served, albeit late, in the 18 L 8418 case and filed their appearances; and (2) on June 28, 2019, McNeal voluntarily dismissed 18 L 8418 and on July 24, 2019, only 26 days later, re-filed 18 L 8418 as 19 L 8174. With the

proper focus established, this court may properly address the *Segal* factors.

The first factor – the length of time to obtain service – is complicated by the fact that McNeal filed three separate lawsuits. In the first – 18 L 8418 – it took McNeal eight months to perfect service on Clark Brands and World Fuel. On May 8, 2019, less than one month later, the defendants filed their appearances. Glaring in its absence is any attempt by the defendants to file a Rule 103(b) motion in the 18 L 8418 case despite the fact that an eight-month delay in service is as significant now as it was then. Further, the defendants plainly had ample time to file such a motion before McNeal voluntarily dismissed the case on June 28, 2019. It is dubious for the defendants to bring a Rule 103(b) motion at this point when they should have filed it more than one year ago.

In the third lawsuit – 19 L 8174 – it took McNeal an additional six months to achieve proper service. Service was complicated first by McNeal's glaring error of serving a summons with the 18 L 8418 case number but attaching the 19 L 8174 complaint. That error, of course, made service improper. The defendants, nonetheless, asked McNeal to agree to additional time to appear and answer, at which point the defendants went to radio silence. In other words, at least three months in the delay of proper service in 19 L 8174 is attributable to the defendants' failure to inform McNeal that she had erred in serving a mismatched summons and complaint.

As to the second factor – McNeal's activities – the record has more gaps than facts. McNeal omits any explanation of why it took so long to serve Clark Brands and World Fuel in the 18 L 8418 case. Further, she does not explain the logic of voluntarily dismissing that case despite achieving service on Clark Brands and World Fuel and after they filed appearances.

The record as to the third and fourth factors – McNeal's knowledge of the defendants' location and the difficultly in

obtaining correct addresses – are, once again, undeveloped. It is, nonetheless, plain from the record that McNeal had the correct address for each defendant in the 18 L 8418 case. And by the time McNeal served the defendants, again, albeit improperly, in the 19 L 8174 case, she had learned from the second lawsuit that Clark Brands had moved.

As to the fifth factor – the defendants' knowledge of the lawsuit – the record provides that World Fuel knew of a lawsuit as of August 27, 2018, when the sheriff achieved service in the 18 L 8953 case. It is unclear (and also irrelevant) whether World Fuel knew of the 18 L 8418 case at that time. It is also unclear, but can be inferred, that Clark Brands also learned of the lawsuit soon after service on World Fuel because the same counsel represents both defendants. Notwithstanding that inference, it is plain that Clark Brands knew of the lawsuit no later than April 2019 when McNeal achieved proper service in 18 L 8418.

As to the sixth factor – special circumstances affecting service of process – the record indicates that in 19 L 8174, McNeal achieved service, albeit improper, within one month after she filed suit. Yet the defendants effectively delayed proper service in 19 L 8174 by as much as five months by first seeking from McNeal an agreement for an extension of time to answer or otherwise plead and then failing to inform McNeal that the defendants were objecting to improper service. That time cannot be counted against McNeal.

As to the seventh factor – actual service – McNeal achieved service on World Fuel on August 27, 2018, within weeks of filing 18 L 8953. In contrast, McNeal failed utterly to achieve what should have been simple corporate service on Clark Brands until April 2019 in the 18 L 8418 case, eight months after filing that original lawsuit.

Based on this record, one thing is quite clear: there is plenty of blame to go around in this case. McNeal should have known that she filed 18 L 8953 in error. She should have voluntarily

dismissed that case and moved forward to perfect service on the defendants in the 18 L 8418 case. McNeal is also at fault in the 19 L 8174 case for not ensuring that the special process server had a matching summons and complaint.

At the same time, the defendants cannot escape two overriding facts. First, they failed to bring a Rule 103(b) motion in the 18 L 8418 case, in which they potentially had a good argument based on an eight-month delay in service. Their objection to late service at this point rings hollow. Second, the defendants lulled McNeal into believing that they would be appearing in the 19 L 8174 case but sat idly by without informing McNeal that they were objecting to improper service.

In sum, World Fuel knew of McNeal's claims no later than August 27, 2018 – 10 days after the filing of the 18 L 8953 complaint and 21 days after the filing of the 18 L 8418 complaint. Clark Brands may have learned of the claims soon thereafter based on their shared representation. If, however, Clark Brands did not learn of McNeal's claims until April 2019 in the 18 L 8418 case, then it is inexcusable for Clark Brands to object now to late service when it failed to do so more than one year ago before McNeal voluntarily dismissed the case. That time is attributable to Clark Brands, not McNeal.

Conclusion

For the reasons stated above:

1. The defendants' motion to dismiss is denied;
2. The defendants have until June 26, 2020 to answer the complaint; and
3. This matter will be heard for case management upon notice to the parties.

Judge John H. Ehrlich

MAY 28 2020

Circuit Court 2075

John H. Ehrlich, Circuit Court Judge