REL: December 6, 2019

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2019-2020

2180354

James Brooks

v.

Austal USA, LLC

Appeal from Mobile Circuit Court
(CV-18-900446)

HANSON, Judge.

James Brooks appeals from a judgment of the Mobile Circuit Court disposing of his claims against Austal USA, LLC ("Austal"), by determining that they were barred by the applicable statute of limitations. We reverse and remand.

Facts and Procedural History

On February 23, 2016, Brooks allegedly suffered a workplace injury while employed by Austal. On February 16, 2018, Brooks filed a complaint for workers' compensation benefits against Austal in the Mobile Circuit Court. There is no dispute that the complaint was filed within the two-year statute of limitations applicable to claims for workers' compensation benefits. See generally Ala. Code 1975, § 25-5-80. Brooks's complaint included instructions for the circuit clerk to serve a summons and a copy of the complaint on Austal by certified mail at the following address:

> "Austal USA, LLC
> c/o CSC Lawyers Incorporating SVC. Inc.
> 150 S. Perry St.
> Montgomery, AL 36104"

The summons was issued by the clerk via certified mail on February 21, 2018. On March 1, 2018, the clerk made a docket entry noting that the summons had been returned with the notation "not found."

On October 9, 2018, Brooks supplied the clerk with an alias summons for service by certified mail at the following address:

> "Austal USA, L.L.C.

c/o Corporation Service Co.
641 S. Lawrence St.
Montgomery, AL 36104"

The summons was reissued by the clerk via certified mail on October 10, 2018, and service on Austal was perfected on October 12, 2018.

On November 12, 2018, Austal moved to dismiss Brooks's complaint under Rule 12(b)(6), Ala. R. Civ. P., contending that Brooks's action was barred by § 25-5-80.[1] Specifically, Austal contended that, at the time Brooks filed his complaint, he had had no bona fide intent to immediately perfect service on Austal. Thus, according to Austal, the action could not be considered to have been commenced within the limitations period under Alabama law. In support of its argument, Austal attached a document obtained from the Alabama Secretary of State's Web site identifying Corporation Service Company, Inc. ("CSC"), as Austal's registered agent for service at the time Brooks's complaint was filed -- evidence that, according to Austal, demonstrated that Brooks knew, or could have readily

[1]Austal's motion stated that it was also filed pursuant to Rule 12(b)(4), Ala. R. Civ. P. Austal's motion, however, contained no arguments relating to insufficiency of process, which is the purview of a motion under that subsection.

discovered, Austal's correct service address. Austal contended that Brooks's delay of more than seven months in providing the clerk with Austal's correct service address after the initial attempt at service had failed indicated Brooks's lack of intent to timely perfect service.

In response to Austal's motion, Brooks argued that he, in fact, had the intent to serve Austal immediately, as evidenced by the fact that he had instructed the clerk to issue service of process immediately upon the filing of his complaint. As an explanation for why he had initially directed service to CSC Lawyers Incorporating SVC. Inc. ("LIS"), Brooks's attorney noted that LIS had been Austal's former registered agent for service immediately before CSC and that the same attorney had successfully perfected service on Austal through LIS in an unrelated case that had been brought approximately one year before Brooks's complaint was filed. Brooks also submitted evidentiary material in support of his argument: a copy of a document from the Secretary of State's office evidencing that, on April 28, 2017, Austal had formally changed its registered agent for service from LIS to CSC.

The trial court conducted a hearing on Austal's motion to dismiss on December 14, 2018. No transcript of that hearing is in the appellate record. On December 17, 2018, the trial court granted Austal's motion to dismiss and entered a judgment dismissing Brooks's claim with prejudice. Brooks appealed.

Standard of Review

In determining the standard of review, we must first consider whether the parties' submission of matters outside the pleadings and the trial court's election not to exclude those matters converted Austal's Rule 12(b)(6) motion into a motion for a summary judgment. Rule 12(b), Ala. R. Civ. P., provides:

> "If, on a motion asserting the defense number (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to an not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, [Ala. R. Civ. P.,] and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

Furthermore, our supreme court has stated:

> "'"When matters outside the pleadings are considered on a motion to dismiss, the motion is converted into a motion for summary judgment, Rule 12(b), Ala. R. Civ.

> P.; this is the case regardless of what the motion has been called or how it was treated by the trial court, Papastefan v. B&L Constr. Co., 356 So. 2d 158 (Ala. 1978); Thorne v. Odom, 349 So. 2d 1126 (Ala. 1977). 'Once matters outside the pleadings are considered, the requirements of Rule 56, [Ala. R. Civ. P.], become operable and the "moving party's burden changes and he is obliged to demonstrate that there exists no genuine issue as to any material fact and that he is entitled to a judgment as a matter of law." C. Wright & A. Miller, Federal Practice & Procedure, Civil, 1366 at 681 (1969).' Boles v. Blackstock, 484 So. 2d 1077, 1079 (Ala. 1986)."'"

Lifestar Response of Alabama, Inc. v. Admiral Ins. Co., 17 So. 3d 200, 212 (Ala. 2009)(quoting Robinson v. Benton, 842 So. 2d 631, 634 (Ala. 2002), quoting in turn Hornsby v. Sessions, 703 So. 2d 932, 937-38 (Ala. 1997)).

In this case, Austal's motion to dismiss relied on matters outside the pleadings. Brooks responded to the motion by submitting additional material from outside the pleadings. The trial court did not expressly exclude those materials from its consideration in ruling on the motion to dismiss. Moreover, given the basis of the motion, it appears that the trial court necessarily relied on materials contained in the parties submissions, i.e., matters outside the pleadings, in

rendering its judgment in favor of Austal.[2] We, therefore, conclude that the judgment under review is in the nature of a summary judgment and apply the corresponding standard of review:

> "'We review the trial court's grant or denial of a summary-judgment motion de novo, and we use the same standard used by the trial court to determine whether the evidence presented to the trial court presents a genuine issue of material fact. Bockman v. WCH, L.L.C., 943 So. 2d 789 (Ala. 2006). Once the summary-judgment movant shows there is no genuine issue of material fact, the nonmovant must then present substantial evidence creating a genuine issue of material fact. Id. "We review the evidence in a light most

[2]Austal's motion raised the statute of limitations as a bar to Brooks's claims. "[T]he standard for granting a motion to dismiss based upon the expiration of the statute of limitations is whether the existence of the affirmative defense appears clearly on the face of the pleading." Braggs v. Jim Skinner Ford, Inc., 396 So. 2d 1055, 1058 (Ala. 1981). Here, there is nothing on the face of the complaint to indicate that the action is time-barred or that Brooks did not have the present intent to serve Austal. To the contrary, the complaint indicated that it was filed within two years of the alleged workplace accident and contained instructions for the clerk to serve Austal by certified mail. See also Smith v. Norfolk S. Ry. Co., 767 F. Supp. 2d 1276, 1279 (S.D. Ala. 2011) (concluding that a motion to dismiss filed pursuant to Rule 12(b)(6), Fed. R. Civ. P., stating that the plaintiff did not intend to perfect service at the time of filing, was premature). Thus, in concluding that the action was time-barred, the trial court must have considered matters outside the pleadings.

> favorable to the nonmovant." 943 So. 2d at 795. We review questions of law de novo. Davis v. Hanson Aggregates Southeast, Inc., 952 So. 2d 330 (Ala. 2006).'"

Lloyd Noland Found., Inc. v. HealthSouth Corp., 979 So. 2d 784, 793 (Ala. 2007)(quoting Smith v. State Farm Mut. Auto. Ins. Co., 952 So. 2d 342, 346 (Ala. 2006)).

Analysis

It is well settled that the mere filing of a complaint does not "commence" an action for the purposes of satisfying the statute of limitations:

> "The filing of a complaint commences an action for purposes of the Alabama Rules of Civil Procedure but does not 'commence' an action for purposes of satisfying the statute of limitations. Pettibone Crane Co. v. Foster, 485 So. 2d 712 (Ala. 1986). See also Dunnam v. Ovbiagele, 814 So. 2d 232 (Ala. 2001); Maxwell v. Spring Hill Coll., 628 So. 2d 335, 336 (Ala. 1993) ('"This Court has held that the filing of a complaint, standing alone, does not commence an action for statute of limitations purposes."'(quoting Latham v. Phillips, 590 So. 2d 217, 218 (Ala. 1991))). For statute-of-limitations purposes, the complaint must be filed and there must also exist 'a bona fide intent to have it immediately served.' Dunnam, 814 So. 2d at 237-38."

Precise v. Edwards, 60 So. 3d 228, 230-31 (Ala. 2010). Moreover:

> "'[A] bona fide intent to have [an action] immediately served' can be found when the plaintiff, at the time of filing, performs all the tasks

> required to serve process. ... On the other hand, when the plaintiff, at the time of filing, does not perform all the tasks required to effectuate service and delays a part of the process, a lack of the required bona fide intent to serve the defendant is evidenced."

Precise, 60 So. 3d at 233.

Here, Austal has argued that Brooks knew or should have known the name and address of Austal's actual registered agent, as well as Austal's physical location, at the time Brooks filed his complaint. Thus, Austal contends, Brooks's failure to provide the clerk with Austal's correct address amounts to a failure to perform all tasks required to effectuate service. Austal also posits that Brooks's lack of intent to effect service is further evidenced by Brooks's approximately seven-month delay in seeking to serve Austal after he had received notice that the first attempt at service had failed. Brooks, on the other hand, contends that his intent to have Austal immediately served is evidenced by the fact that, at the time he filed his complaint, he immediately sought to have Austal served. Further, he offered evidence tending to indicate that his attempt to serve Austal through LIS was a mistake or oversight stemming from Austal's having

changed its registered agent from LIS to CSC relatively shortly beforehand.

Although the parties have cited a number of cases to this court, we deem Thompson v. E.A. Industries, Inc., 540 So. 2d 1362 (Ala. 1989), to be controlling. In Thompson, a plaintiff was struck and injured by his employer's railcar. The plaintiff sued the railcar's manufacturer and attempted, unsuccessfully, to serve the manufacturer at the manufacturer's registered place of business in North Carolina. Approximately seven months later, the plaintiff learned the manufacturer's correct address. Nevertheless, even after obtaining the correct address, the plaintiff did not serve process on the manufacturer until more than three years after the initial filing of his complaint. The manufacturer moved for a summary judgment, arguing that the plaintiff's claims against it were barred by the then-applicable one-year statute of limitations, and the trial court entered a summary judgment in favor of the manufacturer. The plaintiff appealed.

On appeal, our supreme court in Thompson discussed the cases of Ward v. Saben Appliance Co., 391 So. 2d 1030 (Ala. 1980), and De-Gas, Inc. v. Midland Resources, 470 So. 2d 1218

(Ala. 1985). In Ward, the plaintiff's attorney, at the time of the filing of the complaint, asked the clerk not to serve process until he could obtain more information in the case, leading our supreme court in Ward to conclude that the action had not been "commenced" when the complaint was filed because "it was not filed with the bona fide intention of having it immediately served." 391 So. 2d at 1035. Likewise, in De-Gas, our supreme court, citing Ward, held that an action was not "commenced" for statute-of-limitations purposes when a plaintiff had failed to pay the filing fee at the time the complaint was filed. The court in Thompson then concluded:

> "In both Ward and De-Gas, the intent not to serve the defendant or to pay the filing fees was manifested at the time of filing, i.e., the lack of intent prevented the actual filing from being timely and, therefore, barred the plaintiff's claims by virtue of the statute of limitations. Such is not the case in the situation before us. There is no indication that when [the plaintiff in Thompson] filed his complaint on August 30, 1983, he did not intend to serve process. In fact, service of process was attempted, but was unsuccessful. If this action were barred by the statute of limitations, we are of the opinion that it would have been barred as of August 30, 1983. However, if [the plaintiff] had perfected service even as late as March 1984, when he learned the correct address of [the manufacturer], he would not have been barred by the statute because the requisite intent appears to have been there at the time of filing. Therefore, how can we now say that although he would

> not have been barred by the statute of limitations as late as March 1984, that he is barred later by having withheld service until September 1986? While we recognize that the trial court treated such a situation as within the realm of the statute of limitations, we are of the opinion that the issue was rather one of whether to dismiss the case for failure to prosecute."

540 So. 2d at 1363. Thus, our supreme court in Thompson reversed the judgment entered in favor of the manufacturer.

Likewise, in this case, considering all the evidence in a light most favorable to Brooks, there is nothing to indicate that Brooks's instruction for the clerk to issue service of process by certified mail to Austal's former registered agent, made contemporaneous with the filing of his complaint, was anything other than a bona fide attempt at immediate service; indeed, the facts before us indicate that the attempt to serve Austal through LIS was inadvertent, a product of Austal's having recently changed its registered agent. As indicated in Thompson, a plaintiff who files a complaint with the bona fide intent that it be immediately served on the defendant has "commenced" an action for statute-of-limitations purposes, even if the initial attempt at service fails for want of the defendant's correct address. Furthermore, on the authority of Thompson, a significant further delay in seeking service at

the correct address is of no consequence -- at least with respect to the statute of limitations.[3] Accordingly, Austal did not demonstrate that it was entitled to a judgment as a matter of law on the ground that Brooks's action was commenced outside the statute of limitations, and the summary judgment entered in Austal's favor is, therefore, due to be reversed.

Conclusion

For the foregoing reasons, the judgment of the trial court is reversed, and the cause is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Thompson, P.J., and Moore and Donaldson, JJ., concur.

Edwards, J., concurs in the result, without writing.

[3]Of course there may be other consequences arising from extended delays in perfecting service of process. For example, Rule 4(b), Ala. R. Civ. P., provides a 120-day period for service of the summons and complaint on the defendant, the expiration of which may potentially result in the dismissal of the action by the trial court.