

IN THE COURT OF APPEALS OF IOWA

No. 1-670 / 10-1957
Filed December 7, 2011

GABRIELA G. GARCIA and LUIS GARCIA,
Plaintiffs-Appellees,

vs.

MICHELLE K. RUPP,
Defendant-Appellant.

Appeal from the Iowa District Court for Plymouth County, Steven J. Andreason, Judge.

The defendant's interlocutory appeal contends the court erred when it denied a motion to dismiss for failure to timely complete service of process.

AFFIRMED.

Timothy A. Clausen and Curt S. Steger of Klass Law Firm, L.L.P., Sioux City, for appellant.

James W. Redmond and Peter J. Leo of Heidman Law Firm, L.L.P., Sioux City, and Alexander Esteves, Sioux City, for appellees.

Considered by Eisenhauer, P.J., and Doyle and Mullins, JJ.

EISENHAUER, P.J.

Michelle Rupp was granted interlocutory appeal to challenge the district court order denying her motion to dismiss. She contends the court erred in finding the plaintiffs had “good cause” for failing to serve her within ninety days as required in Iowa Rule of Civil Procedure 1.302(5). Because we agree good cause has been shown, we affirm.

I. Background Facts and Proceedings. Gabriela G. Garcia and Luis Garcia filed a petition on February 22, 2010, alleging Michelle K. Rupp was negligent and caused an automobile collision resulting in damages to the Garcias. On May 22, 2010, the sheriff of Clay County, South Dakota, served the original notice of the action on Rupp’s fifteen-year-old daughter at Rupp’s home in Burbank, South Dakota. On June 15, 2010, Rupp filed a motion to dismiss contending the service of process was not properly served within ninety days of filing as required by Iowa Rule of Civil Procedure 1.302(5). Specifically, she alleged the attempted service was inadequate under Iowa Rule of Civil Procedure 1.305(1) because the daughter was underage.¹ The court overruled the motion, and our supreme court granted Rupp application for interlocutory appeal and transferred the matter to this court.

II. Analysis. We review the district court’s decision for correction of errors at law and assess whether the court’s findings are supported by substantial evidence. *Carroll v. Martir*, 610 N.W.2d 850, 857 (Iowa 2000).

¹ Service may be made “[u]pon any individual who has attained majority.” Iowa R. Civ. P. 1.305(1).

In reviewing a motion to dismiss based upon delay of service, the court may consider affidavits and other evidence submitted outside the petition, and the court may make factual determinations if supported by substantial evidence. See *Crall v. Davis*, 714 N.W.2d 616, 619 (Iowa 2006). In reviewing the motion to dismiss, the trial court considered the pleadings; the proof of service on file; the affidavit of Nicole Rupp attached to her motion to dismiss; and the affidavit of attorney Esteves attached to the Garcias' motion for extension of time to cure service of process, including the copies of communications between attorney Esteves and the sheriff of Clay County, South Dakota, attached to his affidavit.

The trial court found the petition was not served within ninety days as required by rule 1.302(5). By the time of hearing on Rupp's motion to dismiss—August 16, 2010—the Garcias had not obtained a court order granting an extension of time to serve Rupp. Rupp still had not been properly served. Shortly before the hearing, the Garcias filed a motion for extension of time to serve. Although the Garcias' motion was not set for hearing, the court believed the issue of "good cause" under rule 1.302(5) should still be addressed in regard to the motion to dismiss. The court, therefore, addressed both motions.

The court then found the Garcias established good cause for their failure to serve Rupp within ninety days. It found the Garcias provided the service papers to the sheriff of Clay County with the proper address for Rupp approximately four days before the ninety-day deadline expired and directed the sheriff to serve Rupp no later than May 24. It then overruled the motion to dismiss and granted the Garcias' motion for extension and ordered the Garcias to properly serve the defendant within ten days.

As service was made after ninety days, the delay was presumptively abusive. See Iowa R. Civ. P. 1.302(6); *Meier v. Senecaut*, 641 N.W.2d 532, 542 (Iowa 2002). Accordingly, the only question before this court is whether substantial evidence supports the trial court's finding that the plaintiffs demonstrated good cause for the delay. See *Meier*, 641 N.W.2d at 542. Good cause requires plaintiffs to show they have

taken some affirmative action to effectuate service of process upon the defendant[s] or have been prohibited, through no fault of [their] own, from taking such an affirmative action. Inadvertence, neglect, misunderstanding, ignorance of the rule or its burden, or half-hearted attempts at service have generally been waived as insufficient to show good cause.

Id. (citations omitted).

The Garcias sent the papers to the South Dakota sheriff with the proper name and address for the defendant within the ninety-day deadline and instructed the sheriff to serve by the deadline. The return of service indicated substituted service had been made. By the time the Garcias received the return of service, the ninety-day deadline had passed. The South Dakota sheriff attempted service three times before leaving the notice with the daughter. Good cause is generally found when the plaintiff has acted diligently and service is delayed as "a result of the conduct of a third person, typically the process server," or the defendant has evaded service or engaged in misleading conduct. *Wilson v. Ribbens*, 678 N.W.2d 417, 421 (Iowa 2004). We find substantial evidence supports the trial court's finding of good cause. Accordingly, we affirm.

AFFIRMED.