IN THE COURT OF APPEALS OF IOWA

No. 3-1072 / 13-0816
Filed December 18, 2013

J. PARKER RITTGERS, KATELYN GAIL RITTGERS, and KELLY GRACE RITTGERS,
Plaintiffs-Appellants,

vs.

WEST BANK, Successor Trustee to STANLEY FOREST RITTGERS as Trustee of the MARY RITTGERS TRUST, and ALL OTHER KNOWN AND UNKNOWN BENEFICIARIES,
Defendants-Appellees.

Appeal from the Iowa District Court for Polk County, Scott D. Rosenberg, Judge.

Plaintiffs appeal the dismissal of their petition for failure to serve process.

AFFIRMED.

Matthew Sease of Kemp & Sease, Des Moines, for appellants.

Karl Olson and Michael Mock of Parker, Simons & McNeil, P.L.C., West Des Moines, for appellees.

Considered by Doyle, P.J., and Tabor and Bower, JJ.

TABOR, J.

Mary Parker Rittgers died on September 11, 2011. Her son J. Parker Rittgers[1] filed a petition on September 11, 2012, alleging mental incompetence and undue influence in the establishment of her inter-vivos revocable trust. The district court dismissed the petition on May 8, 2013, finding plaintiffs failed to serve process on the trustee within ninety days as required by Iowa Rule of Civil Procedure 1.302(5). The plaintiffs contend their efforts to personally serve trustee Stanley Forest Rittgers by hiring a process server constituted good cause for the court to approve an extension or alternative service under the rule. After reviewing the record, we find the plaintiffs have not shown good cause for failing to complete personal service within ninety days of filing their petition. Accordingly, we affirm.

The following timeline is helpful to our analysis of the case.

On September 7, 2012, Matthew Sease, the plaintiffs' attorney, sent an email to attorney Jim McCarthy, inquiring about the trust established by Mary Rittgers and asking for a copy of the trust document.

Four days later, on September 11, 2012, the plaintiffs filed their petition and jury demand. The document asserted a copy was provided to Stanley Forest Rittgers.

One day after the suit was filed, on September 12, 2012, attorney McCarthy replied to attorney Sease's email, writing: "Have tried to contact

---

[1] J. Parker Rittgers also filed the petition on behalf of his daughters, Katelyn and Kelly. We will refer to them collectively as the plaintiffs for purposes of this appeal.

Trustee to discuss your request. Apparently he's traveling; hope to respond to you later this week."

On October 8, 2012, attorney McCarthy followed up with a letter to Sease, explaining McCarthy's contact with a previous attorney for Parker Rittgers and providing a hand-written note from Mary Rittgers to Parker dated August 19, 2004, which explained why he would not be receiving an inheritance. McCarthy also provided Sease with a copy of a publication notice for the trust.

On December 3, 2012, eighty-three days after the suit was filed, Sease emailed McCarthy to tell him, "I filed suit in this matter back in September. Held off serving Stanley in an attempt to informally obtain trust documents and hear from you." Sease confirmed his clients intended to move forward with the litigation, and asked McCarthy if he would be willing to accept service on behalf of Stanley Rittgers. Sease attached a scanned copy of the petition and original notice to the email. Finally, Sease wrote:

> If you are willing to accept service, please let me know as soon as possible and I will place the original in the mail. If you are not willing to accept service, also please let me know so I may make arrangements to have him served personally.

McCarthy did not respond to the question concerning acceptance of service on behalf of the trustee.

On December 8, 2012, eighty-eight days after the suit was filed, Sease hired Eclipse Process Service LLC in King County, Washington, in an attempt to personally serve trustee Stanley Rittgers. The plaintiffs believed Stanley lived in a suburb of Seattle.

In a "Declaration of Due Diligence" filed under penalty of perjury, process server Darrin Sanford stated that he used an "extensive on-line public and proprietary records database" to search for the trustee. But critical to our analysis, the declaration stated that the original notice and petition was to be served on "J. Parker Rittgers"—instead of the defendant-trustee Stanley Rittgers. The process server also declared: "A P.O. Box in Issaquah WA registered to J. Parker from 3/4/2008 to 12/4/2012 was located in history records." The declaration never mentioned Stanley Rittgers.[2]

On December 18, 2012, ninety-eight days after the suit was filed, the district court generated a form order directing the plaintiffs to either (1) file a return of service with the clerk of court showing compliance with rule 1.302(5) or (2) file a motion with supporting affidavit stating good cause for the failure to timely serve the defendants. The order warned that the court would dismiss the petition if the plaintiffs did not comply within fifteen days.

On January 2, 2013, the plaintiffs filed a motion seeking direction regarding alternative means to serve defendant. The motion alleged the plaintiffs had exercised good cause in trying to serve defendant-trustee by employing the process server and by contacting "the attorney he believes is managing the trust." Attached to the motion, plaintiffs submitted an affidavit from attorney Sease and the declaration of due diligence from the process server.

On January 10, 2013, the district court issued an order finding good cause for service outside the ninety-day deadline and good cause to serve the trustee

---

[2] Neither the plaintiffs nor the defendants discuss the fact that the process server's declaration professes to have searched for the wrong person.

via publication, citing rules 1.302(5) and 1.305(14). The plaintiffs published the original notice on three consecutive weeks in the Des Moines Register and the Daily Journal Commerce for King County, Washington.

On March 22, 2013, West Bank filed a motion to dismiss the petition for failing to complete service on Stanley Rittgers within ninety days. According to West Bank's filing, on March 11, 2013, Stanley Rittgers stepped down as trustee and West Bank became the successor trustee. The plaintiffs filed a resistance to the motion to dismiss on March 28, 2013. The resistance alleged good cause for failing to effectuate personal service on the former trustee. The resistance also alleged efforts by the defendant trustee to evade service. Finally, the resistance urged that dismissal, even if without prejudice to refiling, would create an inequitable result here because the statute of limitations in this action ran on September 11, 2012, citing Iowa Code section 633A.3108 (2013). Also on March 28, 2013, the plaintiffs filed an affidavit of mailing, signed by attorney Sease, which stated an original notice was sent on February 14, 2013, to Stanley Rittgers at his last known address, which was a post office box identified by the process server. The affidavit further stated the notice was returned to sender on March 2, 2013. An attached envelope verified the post office box was closed. The affidavit also purported to be subscribed and sworn before the notary public on "the 28th day of January 2013"—which predated the actions described in the body of the affidavit. West Bank replied to the plaintiffs' resistance, denying the record revealed any evidence of intent by the trustee to evade service.

The district court set the matter for a contested hearing on May 3, 2013. The hearing was not reported. On May 8, 2013, the district court did an about-face from its January 10, 2013 order, ruling:

> The Court, having reviewed the motion, the resistance and the reply brief as well as the court file and having heard the arguments of counsel finds, that for the reasons as set forth by the Defendant, that the case should be and is, hereby dismissed without prejudice.

The plaintiffs now appeal.

I. Standard of Review

We review a district court's ruling on a motion to dismiss for correction of legal error. *Rucker v. Taylor*, 828 N.W.2d 595, 598 (Iowa 2013). While case pleadings ordinarily form the outer boundaries of material to be evaluated in a motion to dismiss, when the motion is based on failure to provide timely service, a court may consider facts outside the pleadings. *Id*. at 598–99. So long as the district court's findings of fact are supported by substantial evidence, they are binding on appeal. *Id*. at 599 (differentiating district court's fact-findings from legal conclusions or application of legal principles, which are not binding on review).

II. Analysis

Rule 1.302(5) provides both the ninety-day service deadline and the manner in which it may be extended:

> If service of the original notice is not made upon the defendant . . . within 90 days after filing the petition, the court, upon motion or its own initiative after notice to the party filing the petition, shall dismiss the action without prejudice as to that defendant . . . or direct an alternate time or manner of service. If the party filing the papers

> shows good cause for the failure of service, the court shall extend the time for service for an appropriate period.

In *Meier v. Senecaut,* 641 N.W.2d 532 (Iowa 2002), the court interpreted Iowa Rule of Civil Procedure 49(f), the predecessor to rule 1.302(5). *Meier* determined a district court could take any one of three actions once service had not been accomplished within ninety days from the filing of the petition. *Id.* at 541. Those actions are (1) dismiss the petition without prejudice, (2) impose alternative directions for service, or (3) grant an extension of time to complete service. *Id.* An extension of time under the rule requires a showing of good cause. *Crall v. Davis*, 714 N.W.2d 616, 619–20 (Iowa 2006).

Good cause requires the plaintiffs to take some affirmative action to effectuate service of process upon the defendant or show they have been prohibited, through no fault of their own, from taking such an affirmative action. *Id.* at 620. "Inadvertence, neglect, misunderstanding, ignorance of the rule or its burden, or half-hearted attempts at service have generally been [deemed] insufficient to show good cause." *Id.* Also, the plaintiffs cannot show good cause if they have intentionally refrained from serving the defendant to delay the development of the action or to allow more time to be gather information before "activating" the lawsuit. *Id*. at 620–21.

The plaintiffs contend the district court erred in its second ruling by not finding good cause for their failure to personally serve Stanley Rittgers.[3] The plaintiffs claim they "performed 'a meaningful attempt to locate or serve' the

[3] The plaintiffs do not question the ability of West Bank, as successor trustee, to challenge the personal service on the former trustee.

original trustee" by asking the trustee's prior counsel if he would accept service and by retaining a process server in Washington State who used an "extensive on-line database" to track down the trustee. But as plaintiffs acknowledge, attorney McCarthy had no duty to accept service, and the plaintiffs' inquiry of counsel did not by itself constitute a meaningful attempt to satisfy rule 1.302(5). Moreover, the plaintiffs did not ask attorney McCarthy for assistance in locating Stanley Rittgers, though McCarthy had indicated in an earlier email that he was in touch with the trustee.

We are left then with the plaintiffs' hiring of Eclipse Process Service on Saturday, December 8, 2012, when the ninety days for service expired on Monday, December 10, 2012. We recognize that in *Falada v. Trinity Industries, Inc.,* 642 N.W.2d 247, 249 (Iowa 2002), the plaintiff waited until the eighty-ninth day to effectuate service and did so on the wrong company. Nonetheless, the supreme court upheld the district court's decision not to dismiss the case for failure to serve a timely original notice. *Id.* at 249–50. But in this case, the plaintiffs do not explain why they waited until the eighty-eighth day to retain the Washington State process server. *See Crall*, 714 N.W.2d at 621 (citing precedent in which the lack of explanation contributed to findings of no good cause).

More critically, the declaration of due diligence from the process server fails to show he took affirmative action to effectuate service of process upon trustee Stanley Rittgers. As discussed above, the process server hired by the plaintiffs swore to the court that he attempted to find and serve "J. Parker

Rittgers" who was the plaintiff, not the defendant. The declaration refers to "J. Parker" a second time when explaining the location of a post office box. While it is possible the two references to "J. Parker" were inadvertent, we are constrained by the facts as they are presented in the sworn declaration. *See Schultz v. Metropolitan Life Ins. Co*., 282 N.W. 776, 780 (Iowa 1938) (noting "[w]hen one makes an affidavit, we must assume that he has knowledge of the facts to which he testifies").

"'Good cause is likely (but not always) to be found when the plaintiff's failure to complete service in timely fashion is a result of the conduct of a third person, typically the process server. . . .'" *Wilson v. Ribbens*, 678 N.W.2d 417, 421 (Iowa 2004) (quoting 4B Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1137, at 342 (2002)). But here, the plaintiffs are not alleging the conduct of the process server is to blame for the failure to complete personal service on Stanley Rittgers. The plaintiffs made no attempt to correct the process server's declaration in the district court. Because the information before us shows the process server received documents "to be served on J. Parker Rittgers" and we have no information the process server actually tried to locate or personally serve trustee Stanley Rittgers,[4] we cannot find the plaintiffs demonstrated good cause for failing to satisfy the ninety-day requirement in rule 1.302(5). It also detracts from the plaintiffs' good-cause argument that they failed to seek an extension within ninety days of filing the petition. *See Meier*, 641

[4] We have also considered the affidavit of mailing filed by attorney Sease, indicating that he obtained the last-known address, a post office box, for Stanley Rittgers from the process server. But inexplicably, that affidavit purports to be subscribed and sworn weeks before the attached original notice was mailed.

N.W.2d at 542-43 (finding plaintiff failed to present substantial evidence of good cause when she did not seek an extension or directions from the court once service could not be accomplished).

Our rules of civil procedure "are to be liberally construed for the purpose of promoting the speedy determination of litigation upon its merits." *Krueger v. Lynch*, 48 N.W.2d 266, 270 (1951). And yet,

> [w]e cannot . . . ignore a clear statutory requirement to achieve what appears to be the best result in a particular case. Such action almost always makes bad law. . . . "The so-called technicalities of the law are not always what they seem. When they establish an orderly process of procedure, they serve a definite purpose and are more than technical; they have substance, in that they lay down definite rules which are essential in court proceedings so that those involved may know what may and may not be done, and confusion, even chaos, may be avoided. They are necessary; without them litigants would be adrift without rudder or compass."

Krebs v. Town of Manson, 129 N.W.2d 744, 748 (1964) (quoting *Esterdahl v. Wilson*, 110 N.W.2d 241, 246 (1961)).

Because the record does not show the plaintiffs acted diligently in attempting to serve the original trustee, we find no legal error in the dismissal.

AFFIRMED.