STATE OF MICHIGAN

COURT OF APPEALS

ROBERT G. THOMPSON,

Plaintiff-Appellant,

v

STATE APPELLATE DEFENDER'S OFFICE,

Defendant-Appellee.

UNPUBLISHED
January 17, 1997

No. 188385
Wayne County
LC No. 95-509745-NM

Before: Smolenski, P.J., and Michael J. Kelly and J.R. Weber,* JJ.

PER CURIAM.

In this legal malpractice action, plaintiff appeals as of right a clerk's order that dismissed this case pursuant to MCR 2.102(E) on the ground that defendants were not served with process before the expiration of the summons and that defendants had not submitted to the court's jurisdiction. We affirm.

Specifically, plaintiff argues that the trial court erred in denying his motion to set aside the dismissal. We disagree. MCR 2.102(F) provides, in relevant part, as follows:

> A court may set aside the dismissal of the action as to a defendant under subrule (E) only . . . when all of the following conditions are met:
>
> (1) within the time provided in subrule (D), service of process was in fact made on the dismissed defendant, or the defendant submitted to the court's jurisdiction;
>
> (2) proof of service of process was filed or the failure to file is excused for good cause shown;
>
> (3) the motion to set aside the dismissal was filed within 28 days after notice of the order of dismissal was given or, if notice of dismissal was not given, the motion was promptly filed after the plaintiff learned of the dismissal.

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* Circuit judge, sitting on the Court of Appeals by assignment.

In this case, the trial court denied plaintiff's motion to set aside the dismissal for the following reasons:

> It is not within a trial court's discretion to grant reinstatement of an action under subrule (F) [of MCR 2.102] if one or more of the requirements are not met. *Durfy v Kellogg*, 193 Mich App 141, 145; [483 NW2d 664 (1992)].
>
> Plaintiff contends that all of the conditions stated above [in MCR 2.102(F)] have been met, therefore the dismissal should be set aside under the court rule. Plaintiff filed this motion within 28 days after notice of the order of dismissal was given in compliance with the third requirements, however, the first and second requirements have not been met. Plaintiff claims to have served both defendants [the individual attorneys, Mardi Crawford and James Neuhard] via certified mail, return receipt requested, but neither defendant has signed a return receipt to prove they were served. Under MCR 2.105(A)(2) service is made when the defendant acknowledges receipt of the mail. A copy of the return receipt signed by the defendant must be attached to proof showing service under subrule (A)(2).
>
> The only evidence presented by plaintiff to show that he served the defendants is a cash receipt showing that he paid for certified mail delivery to both defendants with return receipt requested and a return receipt addressed to Mardi Crawford which was returned on 7/19/95 unclaimed and unsigned. Plaintiff likewise never received a return receipt signed by James Neuhard, therefore service was not effectuated on either defendant prior to the expiration of the summons.
>
> Plaintiff also claims that the defendants submitted to the Court's jurisdiction by filing a limited appearance in a prior matter under Case No. 95-509811-NM. This Court is not concerned with events pertaining to prior lawsuits. Defendant have never filed an appearance in this Court under Case No. 95-509745-NM, therefore defendants have not submitted to this Court's jurisdiction. Since defendants were never served and have not submitted to this Court's jurisdiction, this Court finds that the first requirement of MCR 2.102(F) has not been met.

Plaintiff does not contend that defendants were, in fact, served. Rather, plaintiff concedes that he served defendants by mail and that defendants did not acknowledge receipt of the mail as required by MCR 2.105(A)(2). Thus, we find no error with the trial court's conclusion that "service was not effectuated on either defendant prior to the expiration of the summons." MCR 2.102(F)(1).

However, plaintiff argues that defendants submitted to the court's jurisdiction and, therefore, waived any defense based upon lack of service. As explained in *Penny v ABA Pharmaceutical Co (On Remand)*, 203 Mich App 178; 511 NW2d 896 (1993):

> A party who enters a general appearance and contests a cause of action on the merits submits to the court's jurisdiction and waives service of process objections. *In*

> *re Slis*, 144 Mich App 678, 683; 375 NW2d 788 (1985). Generally, any action on the part of a defendant that recognizes the pending proceedings with the exception of objecting to the court's jurisdiction, will constitute a general appearance. Only two requirements must be met to render an act adequate to support the inference that there is an appearance: (1) knowledge of the pending proceedings and (2) an intent to appear. *Ragnone v Wirsing*, 141 Mich App 263, 265; 367 NW2d 369 (1985). A party that submits to the court's jurisdiction may not be dismissed for not having received service of process. MCR 2.102(E)(2). [*Id*. at 181-182.]

In the lower court, this case was assigned case number 95-509745-NM (case 745). In addition, plaintiff also instituted a separate legal malpractice action below against defendants by filing another complaint similar to the complaint filed in this case. This separate action was assigned case number 95-509811-NM (case 811). Plaintiff and defendants state that defendants' attorney obtained a copy of the complaint filed in this case for the purpose of addressing issues raised pursuant to defendants' motion for summary disposition in case 811. Thus, we assume for the purpose of this analysis that defendants had knowledge of the pending proceedings in this case.

However, as found by the trial court, there is no indication in the record that defendants ever filed an appearance or any pleadings in this case. Nor is there any indication that defendants otherwise engaged in any out-of-court conduct of the type that this Court has previously found sufficient to constitute an intent to appear. See, e.g., *Penny, supra* at 182; *Ragnone, supra* at 265-266; *Slis, supra*; *Deeb v Berri*, 118 Mich App 556; 325 NW2d 493 (1982). Defendant' attorney did appear in case 811, and both case 745 and case 811 are similar legal malpractice cases. However, plaintiff has failed to cite any authority for his proposition that the appearance of a party's attorney in one case constitutes an appearance in another, separate case. We are unable to infer from defendants' attorney's appearance in case 811 an intent by defendants to appear in this case. Thus, we find no error in the trial court's conclusion that defendants did not submit to the court's jurisdiction. Accordingly, the trial court did not err in denying plaintiff's motion where the conditions specified in MCR 2.102(F)(1) for setting aside a dismissal were not satisfied.

To the extent that defendant raises other grounds for his argument that the trial court erred in denying his motion to set aside the dismissal, we decline to address these grounds where they were not raised before and decided by the trial court below. *Bowers v Bowers*, 216 Mich App 491, 495; 549 NW2d 592 (1996).

Affirmed.

/s/ Michael R. Smolenski
/s/ Michael J. Kelly
/s/ John R. Weber