STATE OF MICHIGAN

COURT OF APPEALS

HEINRICH SCHORSCH,

Plaintiff-Appellant,

v

ARMAND VELARDO and ARMAND VELARDO, P.C.,

Defendants-Appellees.

UNPUBLISHED
August 29, 1997

No. 187982
Oakland Circuit Court
LC No. 94-486998-NM

Before: Bandstra, P.J., and Griffin and Fitzgerald, JJ.

PER CURIAM.

Plaintiff appeals as of right an order dismissing this legal malpractice case without prejudice on the ground that plaintiff failed to serve defendants within the ninety-one day time limitation of the original summons. We affirm.

Plaintiff filed this action on November 14, 1994, just before the running of the statute of limitations. Instead of immediately trying to serve defendants, plaintiff waited until after defendant Armand Velardo was deposed in a related lawsuit.[1] Plaintiff began attempting to serve process on defendants eight days before the original summons expired. Plaintiff's alleged attempts to serve defendants within the ninety-one day life of the original summons were unsuccessful. However, the trial court granted plaintiff's *ex parte* petition for issuance of a second summons pursuant to MCR 2.102(D).

After plaintiff served defendants with the second summons, defendants moved to vacate the ex parte order arguing that plaintiff had not shown good cause for the extension of the summons. At the hearing on this motion, defense counsel argued that plaintiff made no attempt to serve defendant until eight days before the summons expired although plaintiff had no difficulty locating and serving defendant Armand Velardo for the deposition in the related case. Plaintiff's counsel admitted to postponing service until after the deposition, asserting that he wanted to wait until after the deposition to ensure that there was cause to proceed against defendants. Noting that plaintiff needed good cause to file the original summons and complaint, the lower court entered an order *nuc pro tunc* setting aside the order

authorizing the second summons. Following an evidentiary hearing, the circuit court granted summary disposition in favor of defendants after finding that service of the original summons and complaint had not been achieved.

On appeal, plaintiff contends that the trial court abused its discretion in ruling that plaintiff had failed to show good cause for the issuance of a second summons under MCR 2.102(D). We disagree.

In *Bush v Beemer*, ___ Mich App ___; ___ NW2d ___ (Docket No. 186360, issued 7/11/97, slip op pp 3-4), this Court held that "good cause" to extend a summons exists only where plaintiff establishes "due diligence" in "*trying to serve process*." Counsel's inadvertent failure or "half-hearted efforts to serve a defendant within the statutory period does not constitute good cause." *Id., quoting Lovelace v Acme Markets*, 820 F2d 81, 83 (CA 3, 1987). Additionally, in "reject[ing] plaintiff's claim that diligent efforts to determine whether a case has merit constitutes good cause for delayed service," this Court stated:

> Such determinations should precede the filing of the complaint. See MCR 2.114. Moreover, neither the language of MCR 2.102(D), the committee's report[2], nor any relevant federal case lends authority to the proposition that basic case evaluation should play a rule in determining whether plaintiff establishes good cause for an extension of the deadline for serving process. Indeed, it makes no sense to seek an extension in the time for serving process where the reason for delayed service has nothing to do with the ability to effect service of process. Accordingly, plaintiff's attempts to evaluate the merits of her case, however diligent, are not to be considered in determining whether plaintiff established good cause for the issuance of a second summons. [*Id.* at 4.]

"The due diligence requirement applies even 'when dismissal [under MCR 2.102(E)] results in the plaintiff's case being time-barred due to the fact that the statute of limitations on the plaintiff's cause of action has run.'" *Id.* at 3, quoting *Lovelace, supra* at 84. We review a trial court's ruling on good cause for an abuse of discretion. *Id.* at 4. Any factual findings underlying this decision we review for clear error. *Id.* at 5.

Applying these principles to the present case, we hold that the trial court did not abuse its discretion in ruling that plaintiff failed to establish good cause for the issuance of a second summons. Instead of diligently attempting to serve process after the summons was issued, plaintiff waited until eight days before the expiration of the ninety-one day period to begin his efforts to achieve service. Plaintiff concedes that the deposition of defendant Armand Velardo in the unrelated case was the basis for the delay. According to plaintiff, the deposition was necessary in order to determine whether the present case was meritorious. However, delays for such a purpose do not constitute diligent efforts to serve process. *Bush, supra* at 4-5. Accordingly, we will not consider plaintiff's attempts to investigate the merits of his case in determining whether he has established good cause for failing to serve process within the life of the original summons.

The issue thus becomes whether the trial court abused its discretion in ruling that the three to five attempts to serve defendants within the final eight days of the original summons did not constitute a diligent effort to serve defendants. We conclude that the lower court did not abuse its discretion.

As a general rule, due diligence will not be established by a flurry of eleventh-hour activity. Moreover, any claim that defendants were unavailable during the life of the original summons is defeated by the fact that, during that time, defendant Armand Velardo was served for a deposition in the related case. Because plaintiff failed to establish good cause for not serving the original summons and complaint within the ninety-one day period, the trial court correctly vacated its ex parte order and dismissed the case pursuant to MCR 2.102(E). See *Bush, supra* at 3.

Plaintiff also claims that defendant should be estopped from denying the sufficiency of process. However, the issue of estoppel was not raised below. Therefore, the issue is waived. *Lintern v Zentz*, 327 Mich 595, 604; 42 NW2d 753 (1950); see, generally, *Royce v Citizens Ins Co*, 219 Mich App 537, 545; 557 NW2d 144 (1996); *Eastway & Blevins Agency v Citizens Ins Co of America*, 206 Mich App 299, 303; 520 NW2d 640 (1994). Additionally, we find no clear error in the trial court's ruling that plaintiff failed to properly serve defendants before the original summons expired on February 13, 1995. Service of process is governed by MCR 2.105, which does not allow for substituted service by giving process to defendant's father. Nor do the facts establish that plaintiff's counsel's was induced into believing that valid service was effected by serving defendant's father. To the contrary, plaintiff's counsel hired a professional process server to serve defendants immediately after learning that his law clerk had served defendant's father. Nothing in the record establishes that plaintiff made timely service that complied with MCR 2.105.

Affirmed.

/s/ Richard A. Bandstra
/s/ Richard Allen Griffin

[1] Plaintiff had filed an action in a neighboring county against defendant's partners.

[2] See the Report of the Caseflow Management Rules Committee, April 3, 1990, 435 Mich 1210.