

STATE OF MICHIGAN
COURT OF APPEALS

DANIEL JAMES CRONIN,

Plaintiff-Appellant,

v

WILLIAM H. OHLE,

Defendant-Appellee.

UNPUBLISHED
October 29, 1999

No. 212817
Emmet Circuit Court
LC No. 97-004309 NI

Before: McDonald, P.J., and Neff and Smolenski, JJ.

PER CURIAM.

This negligence action was filed in 1997 and arises from an automobile accident that occurred in Emmet County in 1994. Following two extensions of the time granted to plaintiff to serve the complaint and summons, the trial court granted defendant's motion for summary disposition pursuant to MCR 2.116(C)(3). Plaintiff appeals as of right. We affirm.

I

On July 21, 1997, plaintiff filed a complaint in the instant action. The summons issued with the complaint expired on October 20, 1997. In early October 1997, plaintiff attempted service of process and learned that defendant was deceased.¹ Nonetheless, on October 15, 1997, plaintiff petitioned the court for, and subsequently was issued, a second summons on the basis that plaintiff was unable to locate defendant despite "repeated attempts."²

Shortly before the second summons expired on January 21, 1998, plaintiff requested an extension of the summons, averring that defendant was deceased and additional time was necessary to serve process on the yet unnamed personal representative of defendant's estate. The court amended the second summons, extending it to April 10, 1998. Service was effected on the personal representative on April 9, 1998. Defendant moved for summary disposition on the ground of insufficient service of process, contending that plaintiff could not demonstrate good cause for the extensions of time to serve defendant, as required under MCR 2.102(D).

II

This Court reviews a trial court's decision regarding whether good cause existed to extend a summons for an abuse of discretion. *Bush v Beemer*, 224 Mich App 457, 464, 466; 569 NW2d 636 (1997). The court's underlying factual findings are reviewed for clear error. *Id.* at 465.

MCR 2.102(D) provides in relevant part:

Expiration. A summons expires 91 days after the date the complaint is filed. However, within that 91 days, on a showing of *good cause*, the judge to whom the action is assigned may order a second summons to issue for a definite period not exceeding 1 year from the date the complaint is filed. If such an extension is granted, the new summons expires at the end of the extended period. The judge may impose just conditions on the issuance of the second summons. [Emphasis added.]

In *Bush, supra* at 462-464, this Court construed the phrase "good cause" and concluded that "good cause" to extend a summons requires a showing of due diligence in attempting service of process. The plaintiff bears the burden of establishing good cause. *Id.* at 464.

In this case, the trial court identified three periods of delay, which together, demonstrated a lack of due diligence to effect service of process. The first was the initial delay of over sixty days between the filing of the complaint by plaintiff's initial counsel and the transfer of the case to local counsel in northern Michigan, with no effort to accomplish service. A second delay occurred between October 13, 1997, the time successor counsel discovered that defendant was deceased, and January 7, 1998, when counsel sent probate documents to plaintiff to open defendant's estate. The third delay occurred between January 7, 1998 and February 23, 1998, in obtaining plaintiff's signature on the probate documents.

We conclude that the trial court did not abuse its discretion in finding that plaintiff failed to establish good cause for the extensions of the summons. During the first sixty days after filing the complaint, plaintiff's initial counsel in Mt. Clemens made no effort to serve the summons and complaint. Rather than immediately seeking a process server in northern Michigan, who could have attempted service, counsel apparently spent the time searching for competent local counsel to represent plaintiff.

Following the discovery that defendant was deceased, plaintiff spent the next three months doing legal research regarding opening an estate, contacting the wrong probate court and failing to make the correct inquiries to ascertain the status of defendant's estate, and hiring a private investigator who ultimately provided plaintiff with information already at his disposal. Finally, service of process was delayed because plaintiff apparently failed to inform counsel of his change of address which prevented the timely signing of probate papers necessary to open the estate.

Plaintiff's lack of any concerted effort to serve process supports the trial court's finding that plaintiff failed to establish good cause. *Bush, supra* at 464. Additionally, when plaintiff moved for the initial extension of the summons, he inaccurately represented to the court that he had made "repeated"

efforts to serve process, but had been unable to locate defendant's whereabouts. Plaintiff admittedly made only *one* initial attempt to serve process, learning at that time that defendant was deceased. The expenditure of time searching for counsel and researching how to open an estate is analogous to researching a claim to determine whether it is meritorious, and this Court held in *Bush, supra* at 464, that such efforts did not constitute good cause for delayed service. Finally, the passage of nearly two months while plaintiff's counsel waited for plaintiff to sign the petition to open an estate further evidences a failure to exercise due diligence.

Plaintiff contends that the trial court erred by failing to consider the lack of prejudice to defendant in determining whether good cause exists. The trial court evaluated plaintiff's claim regarding the lack of prejudice and rejected it. We do not find this to be an abuse of the trial court's discretion. While dismissal of this case will work a harsh result because plaintiff's complaint may now be time-barred by the statute of limitations, this Court has held that "[t]he due diligence requirement applies even 'when dismissal 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.'" *Bush, supra* at 463, quoting *Lovelace v Acme Markets, Inc.*, 820 F2d 81, 84 (CA 3, 1987).

Affirmed.

/s/ Gary R. McDonald

/s/ Janet T. Neff

/s/ Michael R. Smolenski

¹ Although plaintiff was unclear as to the exact timing of these matters, the lower court determined that the process server attempted service on October 4, 1997, learned that defendant was deceased, and communicated this information to plaintiff's counsel on or before October 13, 1997. We accept these findings.

² Plaintiff filed ex parte petitions for both the second summons and the amended second summons.