STATE OF MICHIGAN

COURT OF APPEALS

MARGARET BRYSON,

Plaintiff-Appellant,

v

VTS, d/b/a BRANDY'S II,

Defendant-Appellee,

and

LORI ELLA JOKELA,

Defendant.

UNPUBLISHED
May 25, 2001

No. 218399
Wayne Circuit Court
LC No. 92-234878-NS

Before: Jansen, P.J., and Zahra and Owens, JJ.

PER CURIAM.

Plaintiff appeals as of right from a circuit court order granting defendant's[1] motion for summary disposition pursuant to MCR 2.116(C)(3). We reverse and remand. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

When Plaintiff was unable to serve the complaint and summons by the original service date, she obtained a second summons, valid through June 17, 1993, and, subsequently, an order for alternate service. Instead of serving defendant as provided in the order, plaintiff posted the summons and complaint at the home of Terry Alcorn, who was alleged to be defendant's resident agent. Defendant filed an answer and affirmative defense on July 15, 1993, and also filed a motion to quash. The trial court granted the motion to quash and dismissed the action, finding that service was ineffective because it was not made in the manner specified in the order for alternate service. We reversed and remanded for an evidentiary hearing to determine whether defendant received actual notice of the action before the second summons expired. *Bryson v V.T.S., Inc*, unpublished opinion per curiam of the Court of Appeals, (Docket No. 186573, issued 08/26/97). Upon remand, defendant filed a renewed motion for summary disposition. The only new evidence submitted was the affidavit of George Psykala, an officer and shareholder of VTS,

[1] Only defendant VTS has appealed and therefore "defendant" in this opinion refers to VTS.

who stated that he knew nothing about plaintiff's suit until an attorney notified him on August 12, 1993. The court granted the motion without holding an evidentiary hearing.[2]

It was a given that plaintiff failed to make service in the manner directed by the court in the order for alternate service. However, "defective service of process will not warrant dismissal of a party's pleading unless the service failed to notify the defendant of the action 'within the time prescribed for service.' MCR 2.105(J)(3). [Nevertheless], a complete failure of service, e.g., failure to serve the summons with the complaint within the time for service, warrants dismissal for improper service of process." *In re Gordon Estate,* 222 Mich App 148, 157-158; 564 NW2d 497 (1997). "Thus, if a defendant actually receives a copy of the summons and complaint within the permitted time, he cannot have the action dismissed on the ground that the manner of service contravenes the rules." *Hill v Frawley,* 155 Mich App 611, 613; 400 NW2d 328 (1986).

The summons and complaint were posted at Alcorn's residence. Alcorn was, along with Psykala, a shareholder of VTS. He was also alleged to be the resident agent. Either way, he was authorized to accept service of process for the company. MCR 2.105(D)(1). If he found the summons and complaint before June 18, 1993, he would have had actual notice of the action and dismissal would have been improper even though the manner of service was defective. *Hill*, *supra*.[3] The evidence presented to the trial court did not show what became of the documents after they were posted and whether Alcorn got them. While Psykala said he himself didn't have knowledge of the suit, no one tried to serve him and he was not qualified to say what Alcorn knew or didn't know. Similarly, the evidence submitted by plaintiff showed only that defendant and its insurer had notice of plaintiff's intent to file suit and that the insurer and a lawyer for VTS received a copy of the summons and complaint. It did not show that someone authorized to accept service of process for VTS had received the summons and complaint before the summons expired. See MCR 2.105(D), (H). Therefore, an evidentiary hearing is necessary to resolve that question.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Brian K. Zahra
/s/ Donald S. Owens

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[2] In our previous opinion, we found that it was unclear whether defendant received actual notice prior to the expiration of the second summons. We therefore declared that "[a]n evidentiary hearing is necessary to resolve this question." (*Bryson, supra*; slip op at 2). We remanded the case "for further proceedings consistent with this opinion." Id. at 3.

[3] Defendant's filing of an answer to the complaint and affirmative defenses on July 15, 1993 is same evidence that defendant received actual notice; however, it remains unclear whether defendant received actual notice prior to the expiration of the second summons on June 17.