

STATE OF MICHIGAN
COURT OF APPEALS

MARY S. WILLIAMS,

Plaintiff-Appellant,

v

HAMILTON FAMILY HEALTH CENTER,

Defendant-Appellee.

UNPUBLISHED
February 19, 2004

No. 243574
Genesee Circuit Court
LC No. 02-072792-NO

Before: Schuette, P.J., and Meter and Owens, JJ.

PER CURIAM.

Plaintiff appeals as of right from a circuit court order granting defendant's motion for summary disposition. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff's cause of action accrued on March 3, 1999, and the period of limitations expired on March 3, 2002. MCL 600.5805(1), (10). Because March 3, 2002, was a Sunday, plaintiff had until March 4, 2002, to file the complaint. MCR 1.108(1). Plaintiff allegedly mailed her complaint to the clerk's office on March 1, 2002, and it was time-stamped as received on March 5, 2002. The summons was issued on that date and was valid through June 4, 2002. Plaintiff served defendant's insurance agent in March and served a purported agent of defendant on June 4, 2002. Plaintiff did not serve defendant in the manner prescribed by MCR 2.105(D).

Defendant moved to dismiss on the ground that service of process was improper and the statute of limitations had expired. The trial court agreed and granted the motion. The trial court's ruling on a motion for summary disposition is reviewed de novo. *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000). The interpretation and application of the court rules is a question of law that is also reviewed de novo. *Kernan v Homestead Development Co*, 252 Mich App 689, 692; 653 NW2d 634 (2002). Whether a cause of action is barred by the statute of limitations is a question of law that is reviewed de novo on appeal. *Ins Comm'r v Aageson Thibo Agency*, 226 Mich App 336, 340-341; 573 NW2d 637 (1997).

The law is clear that if the defendant actually receives service of process within the life of the summons, the fact that the manner of service was improper is not grounds for dismissal. MCR 2.105(J)(3); *Hill v Frawley*, 155 Mich App 613; 400 NW2d 328 (1986). It is only where there is a failure of service of process that dismissal is warranted. *Holliday v Townley*, 189 Mich App 424, 425-426; 473 NW2d 733 (1991). There is no evidence in the record to show that the

person served on June 4, 2002, was not an agent or employee of defendant, and defendant did not establish a right to judgment under MCR 2.116(C)(3).

In this case, however, the issue of service is complicated by the statute of limitations issue. Plaintiff's complaint was filed on March 5, 2002, one day after the limitations period expired. Plaintiff contends that the complaint may have been received by the clerk's office on March 4, 2002, and thus would have been timely despite the fact that it was processed and time-stamped the following day. See, generally, *Biafore v Baker*, 119 Mich App 667, 669-670; 326 NW2d 598 (1982). She contends that if she could establish that the clerk's office actually received the complaint on March 4, 2002, the statute of limitations was tolled on that date and the fact that defendant was served with process at a later date did not mandate dismissal.

The Supreme Court had held that as long as a complaint is filed within the limitations period, it is timely even if the defendant is not served with process until later. See *Goniwicha v Harkai*, 393 Mich 255, 257-258; 224 NW2d 284 (1974), and *Buscaino v Rhodes*, 385 Mich 474; 189 NW2d 202 (1971), overruled on other grounds by *McDougall v Schanz*, 461 Mich 15; 597 NW2d 148 (1999). However, the Supreme Court recently overruled the pertinent *Buscaino* holding and concluded that the filing of the complaint alone is insufficient to toll the statute of limitations. *Gladych v New Family Homes, Inc*, 468 Mich 594, 595, 605; 664 NW2d 705 (2003). The statute is tolled only when the complaint is filed and the requirements of MCL 600.5856 are met (the plaintiff makes service of process on the defendant, jurisdiction over defendant is obtained by some other method, or the plaintiff delivers the summons and complaint to an officer for service and the officer makes service within ninety days). *Gladych, supra* at 595, 605. This decision applies retroactively to cases, such as the instant case, in which the issue is raised and preserved. *Id.* at 607-608.

Assuming the clerk's office received the complaint by March 4, 2002, and it could be deemed to have been filed on that date, plaintiff's cause of action would not be saved unless the requirements of MCL 600.5856 were also met. Plaintiff admittedly did not serve anyone with process until after March 4. There is no evidence that jurisdiction was obtained over defendant by some other means by March 4. Plaintiff did deliver the summons and complaint to a process server for service at some unstated time. However, the summons was not issued until the complaint was processed for filing by the clerk's office, so the summons and complaint could not have been delivered to the process server until March 5, 2002, at the earliest, by which time the limitations period had already expired. On appeal, plaintiff does not even allege that the summons and complaint were delivered to a process server by March 4. Therefore, plaintiff's action was time-barred and the trial court did not err in dismissing it.

Affirmed.

/s/ Bill Schuette
/s/ Patrick M. Meter
/s/ Donald S. Owens