Court of Appeals, State of Michigan

ORDER

Christopher L. Evans v Grosse Pointe Public School System

Docket No. 288546

LC No. 08-109953-CZ

Karen M. Fort Hood
Presiding Judge

David H. Sawyer

Pat M. Donofrio
Judges

The Court orders that the motion for reconsideration is GRANTED, and this Court's opinion issued October 22, 2009, is hereby VACATED. A new opinion is attached to this order.

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

JAN 19 2010
Date

Sandra Schultz Mengel
Chief Clerk

STATE OF MICHIGAN

COURT OF APPEALS

CHRISTOPHER L. EVANS, Plaintiff-Appellant,	UNPUBLISHED January 19, 2010
v	No. 288546 Wayne Circuit Court
GROSSE POINTE PUBLIC SCHOOL SYSTEM, Defendant-Appellee.	LC No. 08-109953-CZ ON RECONSIDERATION

Before: Fort Hood, P.J., and Sawyer and Donofrio, JJ.

PER CURIAM.

Plaintiff appealed as of right from an order granting defendant summary disposition based on the failure of service of process, MCR 2.116(C)(3). In *Evans v Grosse Pointe Public School System*, unpublished opinion per curiam of the Court of Appeals, issued October 22, 2009 (Docket No. 288546), we reversed the trial court and remanded for further proceedings, holding that defendant had made a general appearance by filing an answer to the complaint and that the action therefore could not be dismissed based on the failure of service of process. On defendant's motion for reconsideration, we vacate our previous opinion based on *Al-Shimmari v Detroit Med Ctr*, 477 Mich 280; 731 NW2d 29 (2007). Further, we hold that the trial court did not err in concluding that plaintiff failed to serve the summons, that this failure was not excused under MCR 2.105(J)(3), and that defendant was not equitably estopped from raising inadequate service of process as a defense. Accordingly, we affirm the trial court's grant of summary disposition to defendant.

Romeo District Court Officer Thomas George Urban served Janet Truance, the executive assistant to defendant's superintendent, with papers. Urban maintained that it was a summons and complaint, whereas Truance claimed it was the complaint only. Truance represented that this was the first time she had been served process. She signed an acknowledgement of service, acknowledging receipt of a summons and complaint. However, she claimed that she did not read the acknowledgement and that she was told she was signing a document showing receipt of the papers she was handed. Following an evidentiary hearing, the trial court concluded that Truance's account was credible. Since there was no effective service of process and the statute of limitations had expired, the trial court granted defendant summary disposition.

Plaintiff first argues that defendant did not provide a preponderance of evidence to show that Truance was more credible than Urban, and that the factual finding in favor of Truance was against the great weight of the evidence. He also asserts that any factual disputes had to be

resolved in favor of the nonmoving party. In *Al-Shimmari, supra* at 288-289, our Supreme Court held "that a trial court has the discretion to conduct a bench trial to resolve disputed factual questions relating to motions based on [MCR 2.116](C)(1) through (C)(6)," including (C)(3) (insufficient service of process). Here, the court in essence held a bench trial and found that Truance was the more credible witness. A trial court's findings of fact are reviewed for clear error. See *Ross v Auto Club Group*, 481 Mich 1, 7; 748 NW2d 552 (2008).[1] In determining whether factual findings are clearly erroneous, "regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." MCR 2.613(C). Here, although there was an acknowledgement of service indicating that a summons and complaint had been served, Truance gave a cogent explanation for the discrepancy between her testimony and the representation in the document. The trial court's reason for finding her more credible -- that service was a unique occurrence for her and she therefore would have been more likely to remember -- was sound. Thus, there is no basis for concluding that the trial court's finding was clearly erroneous.

Plaintiff next argues that, even if service was deficient, dismissal is precluded by MCR 2.105(J)(3), which provides:

> An action shall not be dismissed for improper service of process unless the service failed to inform the defendant of the action within the time provided in these rules for service.

In support of the proposition that MCR 2.105(J)(3) precludes dismissal, plaintiff points to *Bunner v Blow-Rite Insulation Co*, 162 Mich App 669, 674; 473 NW2d 474 (1987), in which this Court stated:

> If the defendant actually receives a copy of the *summons and* complaint within the time permitted by the court rules, the defendant cannot have the action dismissed on the ground that the manner of service contravened the rules. *Hill v Frawley*, 155 Mich App 611, 613; 400 NW2d 328 (1986). MCR 2.105(J)(3) is not stated in discretionary terms. Neither error in the content of the service nor in the manner of service are to result in dismissal unless the errors are so serious as to cause the process to fail in its fundamental purpose. See 1 Martin, Dean & Webster, Michigan Court Rules Practice (3d ed), p 105. [Emphasis added.]

However, in *Holliday v Townley*, 189 Mich App 424, 426; 473 NW2d 733 (1991), the Court stated that "service of the summons is a necessary part of service of process," and that where there is a failure of service, as opposed to a defect in the manner of service, MCR 2.105(J)(3) is

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[1] To the extent defendant suggests that these findings should be evaluated on a great weight of the evidence standard, it is noted that in *DiFranco v Pickard*, 427 Mich 32, 59; 398 NW2d 896 (1987), superseded on other grounds in *Kreiner v Fischer*, 471 Mich 109; 683 NW2d 611 (2004), the Court indicated, albeit in the context of a trial, that this standard applies to factual findings by a jury, whereas the clearly erroneous standard applies to factual findings by a judge.

to no avail. Because the trial court found that plaintiff did not serve the summons, and accordingly failed to serve process, MCR 2.105(J)(3) does not apply.

Plaintiff next argues that equitable estoppel is a basis for not dismissing the action.

> An equitable estoppel arises where (1) a party by representation, admissions, or silence intentionally or negligently induces another party to believe facts, (2) the other party justifiably relies and acts on this belief, and (3) the other party will be prejudiced if the first party is permitted to deny the existence of the facts. *Howard Twp Bd of Trustees v Waldo*, 168 Mich App 565, 575; 425 NW2d 180 (1988). [*Hughes v Twp of Almena*, 284 Mich App 50, 78; 771 NW2d 453 (2009).]

Plaintiff has failed to establish that Truance induced plaintiff to believe that a summons and complaint had been provided. Here, the error in failing to serve the summons with the complaint is attributable to the process server, who was acting on behalf of plaintiff. "While normally knowledge on the part of an agent is imputable to the principal, where the interest of the agent is adverse to that of the principal, the agent's knowledge is not imputable to the principal." *Bryce v Jones*, 54 Mich App 709, 715; 221 NW2d 433 (1974), rev'd on other grounds 394 Mich 425 (1975). Here, the process server's interest was consistent with plaintiff's interest. Thus, plaintiff is charged with having created the problem. Plaintiff cannot claim that he was induced to believe a fact that is attributable to him.

Because this prong of the equitable estoppel analysis results in a finding that plaintiff is not entitled to the benefit of the doctrine, we need not address the remaining requirements. Likewise, we need not address defendant's alternative argument that it was entitled to summary disposition based on plaintiff's failure to serve an officer by registered mail.

Affirmed.

/s/ Karen M. Fort Hood
/s/ David H. Sawyer
/s/ Pat M. Donofrio