

STATE OF MICHIGAN
COURT OF APPEALS

DARNELL ALVIN,

Plaintiff-Appellant,

v

O. LYNN MOORE and ROY HARRIS,

Defendants-Appellees.

UNPUBLISHED

August 23, 2012

No. 303163

Wayne Circuit Court

LC No. 09-031883-NO

Before: SAAD, P.J., and SAWYER and CAVANAGH, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court order dismissing his complaint. Because the trial court did not deny plaintiff due process and did not err when it denied plaintiff's motion for default judgment and dismissed the case, we affirm.

Plaintiff's complaint alleged that defendants, who are Detroit police officers, assaulted and falsely imprisoned him on January 3, 2007. Plaintiff asserts that he was acquitted of all charges stemming from the incident. On December 30, 2009, plaintiff filed a complaint seeking damages against defendants in their individual capacities, alleging that they wrongfully violated his constitutional rights and caused him permanent injuries. Plaintiff's process server served a summons and copy of the complaint for each defendant on Sergeant Spencer, the officer in charge at the front desk of the narcotics department at the Detroit police headquarters. Sergeant Spencer signed two acknowledgement of service forms indicating that he accepted service on behalf of each defendant. On June 23, 2010, after neither defendant answered or responded to the complaint, plaintiff filed applications for entry of default against each defendant. On January 5, 2011, plaintiff re-noticed his hearing for default judgment and also re-filed his motion for default judgment.

On January 18, 2011, defendants responded to plaintiff's motion for entry of default judgment via special appearance, arguing that plaintiff did not use an accepted method of service of process listed in MCR 2.105(A)(1) to serve either defendant before the summons expired. Defendants also responded that the two-year statute of limitations for assault and false arrest expired on January 1, 2009, and the three-year statute of limitations for a civil rights lawsuit pursuant to 42 USC 1983 expired on January 1, 2010. Finally, defendants contended that plaintiff's default and motion for default judgment were "fatally defective" because plaintiff did not actually serve the defendants within the period allowed by the summons.

On January 21, 2011, the trial court heard argument on plaintiff's motion for default judgment. Plaintiff argued that defendants are undercover officers, and that Sergeant Spencer indicated that he was in control of defendants, told the process server that he was authorized to accept service on behalf of the officers, and signed an acknowledgement with regard to the papers that were served on him for the two officers. Defendants responded that service was improper because "no desk sergeant can accept service or waive jurisdiction on behalf of anyone else, not by DPD policy, not by law department procedure and not under the Michigan Court Rules, so there was defective service." The trial court held that service on the sergeant was "not good enough" and was defective. The trial court also held that, since the statute of limitations had run, the case was dismissed. Plaintiff filed a motion for reconsideration, which the trial court denied. Plaintiff now appeals as of right.

Plaintiff first argues that he was denied due process of law because he was denied his right to notice and a meaningful opportunity to be heard. We review this unpreserved claim of constitutional error for plain error that was outcome determinative. *In re Consumers Energy Co*, 278 Mich App 547, 568; 753 NW2d 287 (2008). Plain error occurs "if (1) an error occurred (2) that was clear or obvious and (3) prejudiced the party, meaning it affected the outcome of the lower court proceedings." *Duray Dev, LLC v Perrin*, 288 Mich App 143, 150; 792 NW2d 749 (2010).

We review de novo as a question of law whether a party has been afforded due process. *Reed v Reed*, 265 Mich App 131, 157; 693 NW2d 825 (2005). Whether an individual has been provided sufficient notice to satisfy due process requirements is a legal question that this Court also reviews de novo. *Vicencio v Ramirez*, 211 Mich App 501, 503-504; 536 NW2d 280 (1995).

"Generally, due process in civil cases requires notice of the nature of the proceedings and an opportunity to be heard in a meaningful time and manner by an impartial decisionmaker." *By Lo Oil Co v Dep't of Treasury*, 267 Mich App 19, 29; 703 NW2d 822 (2005) (quotation marks and citations omitted). "The right to due process of law is a flexible concept and must be analyzed by considering the particular circumstances presented in a given situation." *In re Project Cost & Special Assessment Roll For Chappel Dam*, 282 Mich App 142, 150; 762 NW2d 192 (2009).

Plaintiff is unable to establish a violation or failure to meet any of the due process requirements. At the hearing and on appeal, plaintiff acknowledged that he received defendants' response to his January 5, 2011 motion for default judgment the day before the hearing. In their response, defendants explicitly argued that service of process was defective and also that the applicable statute of limitations had run. Plaintiff was represented by counsel at the scheduled hearing and, at the hearing, both parties presented oral arguments. It is undisputed that the trial judge was impartial and was prepared to rule based on the evidence before the court. Plaintiff's due process rights were not violated because he had notice that the hearing would pertain to both the adequacy of the service of process as well as the statute of limitations.

Plaintiff contends that he only had one day of notice regarding defendants' claims about the inadequacy of service and the statute of limitations and claims that only one day notice was inadequate. Plaintiff's claim fails. The hearing transcript is clear that plaintiff's counsel was well aware that the adequacy of service of process was at issue. Further, the transcript reveals

that plaintiff's counsel presented to the court a very detailed account of the facts surrounding the process server serving Sergeant Spencer and also made a clear and cogent legal argument regarding why he believed service of process was legally adequate. While only one or two days notice may seem like a temporally short period of time, due process is a flexible concept, and under the circumstances presented in this case, plaintiff had ample notice to satisfy the requirements of due process. See *In re Project Cost & Special Assessment Roll For Chappel Dam*, 282 Mich App at 150. Contrast *Al-Maliki v LaGrant*, 286 Mich App 483, 488-489; 781 NW2d 853 (2009) (A party does not receive a meaningful opportunity to be heard when the court raises an issue sua sponte and decides a matter on that basis without giving the party a chance to present countering arguments or evidence.)

Plaintiff also argues that the trial court committed procedural error when it granted summary disposition in favor of defendants and dismissed the case based on insufficiency of the evidence. Plaintiff contends a defaulted party cannot proceed with a motion for summary disposition without first seeking to have the default set aside pursuant to MCR 2.603(A)(3). This argument is without merit and mischaracterizes the record. The trial court did not grant "summary disposition" in defendants' favor. It denied plaintiff's motion for default judgment, set aside the default, and dismissed the case. Further, and more importantly, the argument ignores the fact that the trial court had no jurisdiction over defendants. Because the trial court had no jurisdiction over defendants, MCR 2.603(D)(1) applied. MCR 2.603(D)(1) states:

A motion to set aside a default or a default judgment, *except when grounded on lack of jurisdiction over the defendant*, shall be granted only if good cause is shown and an affidavit of facts showing a meritorious defense is filed. [Emphasis added.]

Because the trial court lacked jurisdiction over defendants, the trial court was not bound by the good cause and affidavit of meritorious defense requirements. Instead, the trial court was free to set aside the default and dismiss the case. Plaintiff has not demonstrated procedural error.

Next, plaintiff argues that the trial court erred when it denied plaintiff's motion for default judgment and dismissed the case because service was valid. A decision to deny a motion for a default judgment is reviewed for an abuse of discretion. *Estate of Reed v Reed*, 293 Mich App 168, 179-180; 810 NW2d 284 (2011), citing *Muscio v Muscio*, 62 Mich App 167, 170; 233 NW2d 224 (1975). The trial court abuses its discretion when its decision is outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

MCR 2.105(A) prescribes the procedure by which an individual person may be served a summons and complaint and states as follows:

(A) Individuals. Process may be served on a resident or nonresident individual by

(1) delivering a summons and a copy of the complaint to the defendant personally; or

(2) sending a summons and a copy of the complaint by registered or certified mail, return receipt requested, and delivery restricted to the addressee. Service is made when the defendant acknowledges receipt of the mail. A copy of the return receipt signed by the defendant must be attached to proof showing service under subrule (A)(2).

Plaintiff did not effectuate service of process in accordance with MCR 2.105(A). It appears that plaintiff's process server attempted the manner of service set out in MCR 2.105(A)(1), personal service. Plaintiff's attempt to serve the summons and complaint by process server failed because the process server did not "deliver" the summons and complaint to either defendant personally. Although plaintiff admits that the process server left the summons and complaint with Sergeant Spencer with his assurance that he was "authorized" to accept service on behalf of both defendants, the process server did not deliver the summons and complaint to defendants *personally* as required. While this Court has held that "in hand" delivery is not mandated, it further specified that "[i]nforming the defendant of the nature of the papers, offering them to the defendant, and leaving them within the defendant's physical control ought to (and does) suffice to constitute 'delivery.'" *Barclay v Crown Bldg & Dev, Inc*, 241 Mich App 639, 647; 617 NW2d 373 (2000). Here, it is undisputed that plaintiff did not inform defendants of the nature of the papers delivered, did not offer them to defendants, and did not leave the papers within defendants' physical control.

Plaintiff asserts that both deliveries should suffice because Sergeant Spencer was "authorized" to accept service on defendants' behalf in accordance with long-standing procedure of the Detroit Police Department. In other words, plaintiff is making the argument that Sergeant Spencer was acting as both defendants' "personal agent." MCR 2.105(H)(1) does permit service "on an agent authorized by written appointment or by law to receive service of process." However, there is no evidence in the record that Sergeant Spencer was "authorized by written appointment or by law to receive service of process." Plaintiff presents nothing other than his own self-serving statements and conjecture that a so-called long-standing procedure of the Detroit Police Department exists in direct contravention of the Michigan Court Rules.

We note that failure to comply with these service of process rules is not always fatal. MCR 2.105(J)(3) states:

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.

While MCR 2.105(J)(3) forgives errors in the manner or content of service of process, it does not forgive a complete failure to serve process. *Holliday v Townley*, 189 Mich App 424, 426; 473 NW2d 733 (1991). Plaintiff continues to assert that service of process was satisfactory and that questions of fact remain regarding whether defendants had knowledge of the action before the summons expired. The record belies this claim. Plaintiff does not contest the fact that his process server delivered the summons and complaint to Sergeant Spencer, not to defendants. There is no evidence whatsoever on this record that either defendant ever received the summons and complaint.

Plaintiff also argues that “there are clearly facts showing detrimental reliance so that principles of estoppel should apply to preclude defendants from denying service or raising the defense of improper service.” Plaintiff has simply announced this position and does not elaborate on, or even identify the facts showing detrimental reliance. “It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.” *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). Thus, we deem this issue abandoned. But we note that plaintiff has also failed to describe any affirmative action that allegedly induced plaintiff’s reliance on the existence or nonexistence of some fact. See *Van v Zahorik*, 460 Mich 320, 335; 597 NW2d 15 (1999).

In sum, plaintiff’s service was not satisfactory under MCR 2.105(A) and, since it is undisputed that the applicable statute of limitations had expired, the trial court did not abuse its discretion when it denied plaintiff’s motion for default judgment and dismissed the case.

Affirmed.

/s/ Henry William Saad

/s/ David H. Sawyer

/s/ Mark J. Cavanagh