

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2018-CA-00275-COA

MICHAEL M. PRIEDE

APPELLANT

v.

STEPHANIE JONES

APPELLEE

DATE OF JUDGMENT:	11/13/2017
TRIAL JUDGE:	HON. CELESTE EMBREY WILSON
COURT FROM WHICH APPEALED:	DeSOTO COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	D. REID WAMBLE
ATTORNEYS FOR APPELLEE:	HARRIS FREDERICK POWERS III RICHARD L. KIMMEL
NATURE OF THE CASE:	CIVIL - PERSONAL INJURY
DISPOSITION:	AFFIRMED - 10/15/2019
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

BEFORE CARLTON, P.J., WESTBROOKS AND C. WILSON, JJ.

C. WILSON, J., FOR THE COURT:

¶1. Michael Priede brought a personal injury action against Stephanie Jones following a motor vehicle accident. Stephanie filed an answer and affirmative defenses, including insufficient process and insufficient service of process. Priede did not attempt to re-serve Stephanie. Eight months later, Stephanie filed a motion to dismiss or, in the alternative, for summary judgment, again alleging insufficient process and insufficient service of process. Priede opposed Stephanie's motion and filed a contemporaneous motion for additional time to serve process on Stephanie. Following a hearing on both motions, the DeSoto County Circuit Court granted Stephanie's motion to dismiss and denied Priede's motion for additional time. Priede now appeals. Finding no error, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2. On December 31, 2013, Priede and Stephanie were in a motor vehicle accident. Almost three years later, on October 12, 2016, Priede filed a complaint against Stephanie in the Desoto County Circuit Court alleging claims arising from the accident. Priede hired a process server, New Albany Police Department Detective Mark Cossitt, to serve Stephanie.

¶3. On October 22, 2016, Cossitt attempted to serve Stephanie at 5745 New Pointe Drive, Southaven, Mississippi. When Cossitt arrived at the home, he was met by a gentleman named Ronnie Jones, who stated that he was Stephanie's husband. Ronnie told Cossitt that Stephanie lived at the 5745 address but that Stephanie was not home. Ronnie further stated that he could accept the summons and complaint for Stephanie. Cossitt gave Ronnie a copy of the summons and complaint. Cossitt then filed a proof of service attesting that he left a copy of the summons and complaint with Ronnie at Stephanie's usual place of abode. On October 25, 2016, Priede mailed a copy of the summons and complaint to Stephanie at the 5745 address.

¶4. On November 21, 2016, Stephanie filed an answer and affirmative defenses to Priede's complaint. On the first page of the answer, Stephanie asserted two affirmative defenses:

First Defense

Motion to Dismiss Pursuant to Rule 12(b)(4)

The Defendant moves the Court to dismiss this cause of action against the Defendant pursuant to Rule 12(b)(4) because of insufficiency of process in that the Summons served on the Defendant did not set forth the correct address of said Defendant.

Second Defense

Motion to Dismiss Pursuant to Rule 12(b)(5)

The Defendant moves the court to dismiss this cause of action against the Defendant pursuant to Rule 12(b)(5) due to insufficiency of service of process in that the Summons was served on the exhusband of the Defendant, who was neither a registered agent or had the authority to accept the Summons on behalf of the Defendant, and the named Defendant did not reside at the address where the exhusband received the Summons and Complaint.

Despite being put on notice of the potential deficiencies in process and service of process of his summons and complaint, Priede did not attempt to re-serve Stephanie or request additional time to re-serve Stephanie during the remainder of the 120-day period.¹

¶5. On August 15, 2017, Stephanie filed a motion to dismiss or, in the alternative, for summary judgment, alleging insufficient process and insufficient service of process. In her motion, Stephanie stated (1) that Ronnie is not, and on October 22, 2016, was not, her husband; (2) that Ronnie is not, and never had been, an agent authorized by appointment or law to receive service of process on her behalf; and (3) that 5745 New Pointe Drive, Southaven, Mississippi, is not, and on October 22, 2016, was not, her residence or usual place of abode.² Stephanie further asserted that while Priede had initially tolled the three-year statute of limitations on his lawsuit by filing the complaint against Stephanie, the statute of limitations began to run again following Priede's failure to properly serve Stephanie within the 120-day period set forth in Mississippi Rule of Civil Procedure 4(h). Stephanie

¹ From the date that Stephanie filed her answer and affirmative defenses, Priede had approximately eighty days left in the 120-day service period provided in Mississippi Rule of Civil Procedure 4(h) in which to re-serve Stephanie.

² Stephanie attached an affidavit attesting to these facts as an exhibit to her motion; however, the affidavit was not signed. On September 14, 2017, Stephanie substituted the affidavit with a signed copy.

contended that the statute of limitations had since expired.

¶6. On August 25, 2017, Priede filed a response opposing Stephanie's motion to dismiss and filed a contemporaneous motion for additional time to serve process on Stephanie. In his response, Priede contended that service was perfected pursuant to Mississippi Rule of Civil Procedure 4(d)(1)(B). Priede asserted (1) that Ronnie was authorized to accept service on behalf of Stephanie, (2) that even if Ronnie was not authorized to accept service on behalf of Stephanie, that Ronnie represented himself as Stephanie's husband with authority to accept service of process, and (3) that 5745 New Pointe Drive, Southaven, Mississippi, was Stephanie's address or usual place of abode at the time Ronnie was served. In support of his contention that the 5745 address was Stephanie's residence, Priede attached the following documents as exhibits to his response:

- "Affidavit of Mark Cossitt" attesting that Ronnie Jones told Cossitt, on October 22, 2016, that he was Stephanie's husband and that Stephanie resided at the 5745 address;
- State of Mississippi uniform crash report dated December 31, 2013, providing 5745 New Pointe Drive Southaven, Mississippi, as Stephanie's address;
- Stephanie Jones's voter registration record, current through July 5, 2016, providing 5745 New Pointe Drive, Southaven, Mississippi, as Stephanie's address;
- Deed to 5745 New Pointe Drive, Southaven, Mississippi, dated July 28, 2000, jointly titled in the names of Stephanie A. Jones and Ronnie W. Jones;
- "Assignment of Mortgage/Deed of Trust" for 5745 New Pointe Drive, Southaven, Mississippi, dated November 28, 2016, referencing December 21, 2006 "Mortgage/ Deed of Trust" executed by Stephanie A. Jones and Ronnie W. Jones;
- "Original Deed of Trust" for 5745 New Pointe Drive, Southaven, Mississippi,

dated July 28, 2000, jointly titled in the names of Stephanie A. Jones and Ronnie W. Jones;

- “Real Property Land Information Display” from the DeSoto County Chancery Court clerk’s office, identifying Stephanie A. Jones and Ronnie W. Jones as landowners of 5745 New Pointe Drive, Southaven, Mississippi; and
- Mississippi residential property record card from the DeSoto County Chancery Court clerk’s office, identifying Ronnie W. Jones as owner of 5745 New Pointe Drive, Southaven, Mississippi.

¶7. On September 14, 2017, Stephanie filed a combined response opposing Priede’s motion for additional time and reply in support of her motion to dismiss. In support of the combined response and reply, Stephanie attached an affidavit attesting (1) that her marriage to Ronnie W. Jones was terminated by a “Decree of Divorce” on January 28, 2015, and (2) that she moved from the marital home, 5745 New Pointe Drive, and began residing at 10792 Wyckford Drive, Olive Branch, Mississippi, in October 2015. Stephanie attached the following as exhibits to her affidavit:

- “Decree of Divorce and Property Settlement Agreement” between Stephanie A. Jones and Ronnie W. Jones, filed in the DeSoto County Chancery Court on January 28, 2015;
- Lease between Stephanie Jones and Crye-Leike Property Management Inc., dated October 13, 2015, for a home located at 10792 Wyckford Drive, Olive Branch, Mississippi;
- Northcentral Electric Power Association utility bill, dated August 11, 2017, for customer Stephanie A. Jones with the service address listed as 10792 Wyckford Drive.

¶8. On October 30, 2017, the circuit court heard both Stephanie’s motion to dismiss and Priede’s motion for additional time. On November 13, 2017, the circuit court entered an order granting Stephanie’s motion to dismiss and denying Priede’s motion for additional

time. On November 21, 2017, Priede filed a motion for reconsideration of the circuit court’s order granting Stephanie’s motion to dismiss and denying Priede’s motion for additional time. On February 1, 2018, the circuit court heard and denied Priede’s motion for reconsideration. Priede filed a notice of appeal. On appeal, Priede contends that (1) the circuit court abused its discretion in dismissing Priede’s complaint and (2) the circuit court abused its discretion in denying Priede’s motion for additional time to serve process. We address these issues in turn.

STANDARD OF REVIEW

¶9. This Court applies a de novo review to a circuit court’s grant or denial of a motion to dismiss. *Smith v. Church Mut. Ins. Co.*, 254 So. 3d 57, 62 (¶11) (Miss. 2018). But we review findings of fact for an abuse of discretion. *Id.* A person’s “usual place of abode” is a finding of fact. *Alpaugh v. Moore*, 568 So. 2d 291, 293 (Miss. 1990). A circuit court’s determination of whether there is “good cause” for failure to serve process is a discretionary ruling, which is also entitled to deferential review for an abuse of discretion. *Lewis Entm’t Inc. v. Brady*, 142 So. 3d 396, 398 (¶6) (Miss. 2014). Where substantial evidence supports the circuit court’s “good cause” determination, we will affirm. *Id.*

¶10. To the extent that a circuit court’s “decision to grant or deny a motion for an extension of time is based upon a precept of law,” we apply a de novo review; “otherwise this Court shall apply the abuse-of-discretion standard.” *Bennett v. McCaffrey*, 937 So. 2d 11, 14 (¶8) (Miss. 2006).

DISCUSSION

I. Whether the circuit court erred in dismissing Priede’s complaint.

¶11. Priede first asserts that the circuit court erred in dismissing his complaint for failure to make timely service of process. Upon review of the record, we disagree.

¶12. Mississippi Rule of Civil Procedure 4(h) provides a time limit for service of process.

Pursuant to Rule 4(h),

If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action *shall be dismissed* as to that defendant without prejudice upon the court’s own initiative with notice to such party or upon motion.

(Emphasis added). When a process server has properly executed a return, “there is a presumption that service of process has occurred.” *Collins v. Westbrook*, 184 So. 3d 922, 929 (¶18) (Miss. 2016) (citing *Pointer v. Huffman*, 509 So. 2d 870, 872 (Miss. 1987)). But this presumption may be rebutted “through the use of extrinsic evidence, ‘including the testimony of the party who is contesting service.’” *Long v. Vitkauskas*, 228 So. 3d 302, 305 (¶9) (Miss. 2017) (quoting *Collins*, 184 So. 3d at 929 (¶18)). “[T]estimony by the contesting party, if believed, is sufficient to overcome the presumption and to support a finding that she was not served.” *Long*, 228 So. 3d at 305 (¶9) (quoting *Lampton-Reid Co. v. Allen*, 171 Miss. 698, 714, 181 So. 780, 783 (1937)).

¶13. In this matter, there is no dispute that Priede’s process server served the summons and complaint on Ronnie, whom he believed to be Stephanie’s husband, at the 5745 New Pointe

Drive address and executed a return.³ Priede thus created a presumption that service of process occurred. *Collins*, 184 So. 3d at 929 (¶18). Stephanie rebutted this presumption, however, by submitting an affidavit with her motion to dismiss, which stated (1) she was never served with the complaint; (2) Ronnie was not her husband or authorized agent when the complaint was served on October 22, 2016; and (3) she did not live at 5745 New Pointe Drive, Southaven, Mississippi, on October 22, 2016.

¶14. In its order granting dismissal, the circuit court found that Priede failed to produce any evidence to contradict Stephanie’s affidavit. We agree. Rule 4(d)(1)(B) allows service “by leaving a copy of the summons and complaint *at the defendant’s usual place of abode with the defendant’s spouse or some other person of the defendant’s family* above the age of sixteen years who is willing to receive service” (Emphasis added). To begin, Ronnie was not Stephanie’s spouse or family member on October 22, 2016; the couple had divorced on January 28, 2015. Further, while Priede’s response in opposition to Stephanie’s motion to dismiss referred the court to a number of documents that associated Stephanie with the 5745 New Pointe Drive address, none of these documents proved that Stephanie lived at that address on October 22, 2016. And “a person’s ‘usual place of abode’ is the place the person is actually living at the time when the service of process is made.” *Alpaugh*, 568 So. 2d at 293. Accordingly, we find the circuit court did not abuse its discretion in finding that Priede did not properly serve Stephanie with process within 120 days of filing his complaint. We

³ There also appears to be no dispute that Priede subsequently mailed a copy of the summons and complaint to Stephanie at the 5745 New Pointe Drive address in accordance with Mississippi Rule of Civil Procedure 4(d)(1)(B).

now move to whether Priede established “good cause” for failing to serve Stephanie with process within 120 days of filing his complaint.

¶15. As noted in Rule 4(h), the court shall not dismiss a matter if the plaintiff can establish “good cause” for failing to serve process on a defendant within 120 days of filing her complaint. *Collins*, 184 So. 3d at 929 (¶19). A determination of “good cause” is a fact-sensitive analysis. *Id.* at 930 (¶20). “To establish ‘good cause’ the plaintiff must demonstrate at least as much as would be required to show excusable neglect, ‘as to which simple inadvertence or mistake of counsel or ignorance of the rules usually does not suffice.’” *Id.* at 929-30 (¶19) (quoting *Webster v. Webster*, 834 So. 2d 26, 28 (¶4) (Miss. 2002)). “This Court has held that ‘good cause is likely (but not always) to be found when the plaintiff’s failure to complete service in timely fashion is a result of the conduct of a third person, typically the process server.’” *Id.* at 930 (¶20) (quoting *Holmes v. Coast Transit Auth.*, 815 So. 2d 1183, 1186 (¶12) (Miss. 2002)). However, “[g]ood cause’ can never be demonstrated where plaintiff has not been diligent in attempting to serve process.” *Estate of Puckett v. Clement*, 238 So. 3d 1139, 1148 (¶25) (Miss. 2018) (quoting *Montgomery v. SmithKline Beecham Corp.*, 910 So. 2d 541, 545 (¶13) (Miss. 2005)).

¶16. Priede contends that he had good cause for failing to serve Stephanie within 120 days of filing his complaint because (1) Ronnie, Stephanie’s former husband, misled the process server, and (2) Stephanie took advantage of such conduct to evade service. Priede relies on *Collins* in support of his position. There, the Mississippi Supreme Court found good cause for the plaintiff’s failure to serve the defendant within 120 days of filing its complaint

because the plaintiff's failure to make timely service "was caused entirely by the conduct of a third person." *Collins*, 184 So. 2d at 930-31 (¶23) (internal quotation mark omitted). In that case, the defendant's father falsely identified himself to the plaintiff's process server as the defendant. *Id.* at 925 (¶¶6-7). The defendant then filed a motion to dismiss for insufficient service of process, arguing that the process server had served his father, not him. *Id.* at 925 (¶8). The plaintiff was unaware of the insufficient service prior to receiving the defendant's motion to dismiss. The circuit court granted the defendant's motion to dismiss, and the Mississippi Supreme Court reversed and remanded the case for further proceedings. *Id.* at 933 (¶31).

¶17. But *Collins* is distinguishable from this case in one key respect: when the plaintiff received notice that service was insufficient. In *Collins*, the plaintiff was not made aware of any potential defect in service until after the 120-day period had passed. *Id.* at 925 (¶8). In the matter at hand, Stephanie put Priede on notice that service was not sufficient well before the end of the 120-day service period. Stephanie did this by asserting specific affirmative defenses on the first page of her answer. Despite receiving this notice, Priede did not make any attempt to re-serve Stephanie within the remaining eighty days of the 120-day period, nor did Priede file a motion for an extension of time to serve Stephanie within the remainder of the 120-day period. In fact, Priede failed to address the insufficient service issue for over eight months, until Stephanie moved to dismiss his complaint.⁴ For these reasons, the circuit court found that Priede was not diligent in attempting to serve Stephanie and therefore did

⁴ Priede did not attempt to further the litigation in any way during this time period, through discovery or otherwise.

not have good cause for failing to serve Stephanie within 120 days of filing his complaint. The circuit court’s findings in this regard do not rise to an abuse of discretion.⁵ Accordingly, we affirm the circuit court’s dismissal of Priede’s complaint without prejudice.⁶

II. Whether the circuit court erred in denying Priede’s motion for additional time to serve process.

¶18. Priede next contends that the circuit court erred in denying his motion for additional time to serve process. Again, we disagree.

¶19. Mississippi Rule of Civil Procedure 6(b)(2) governs enlargements of time when an act is required to be done at or within a specified time. Pursuant to Rule 6(b)(2),

When by these rules or by notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion . . . upon motion made after the expiration of the specified period permit the act to be done *where failure to act was the result of excusable neglect*

(Emphasis added). “This Court has held that the standards for deciding whether a plaintiff has demonstrated ‘good cause’ under Rule 4(h) and ‘excusable neglect’ under Rule 6(b)(2) are virtually identical.” *Collins*, 184 So. 3d at 932 (¶30). As discussed *supra*, the circuit court did not err in finding that Priede did not show good cause for failing to serve Stephanie within 120 days of filing his complaint. It follows that the circuit court did not err in finding no excusable neglect for Priede’s failure to serve process timely. We thus affirm the circuit

⁵ We also find no support in the record for Priede’s bald assertion that Stephanie took advantage of Ronnie’s conduct to evade service.

⁶ In its order, the circuit court noted that it had “not received or considered evidence on the issue of the statute of limitations in this action” and was “not making any findings of fact or law regarding the same.” We likewise make no finding regarding the applicability of the statute of limitations to Priede’s claims.

court's denial of Priede's motion for additional time to do so.

¶20. **AFFIRMED.**

**BARNES, C.J., CARLTON AND J. WILSON, P.JJ., GREENLEE,
WESTBROOKS, TINDELL, McDONALD, LAWRENCE AND McCARTY, JJ.,
CONCUR.**