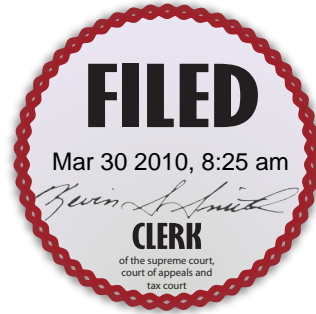


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

ROSA MARTINEZ, MI FAMILIA TIENDA,)
and NASSIROU GADO,)

Appellants-Defendants,)

vs.)

MARIA ESPINOZA,)

Appellee-Plaintiff.)

No. 49A04-0907-CV-372

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Timothy Oakes, Judge
Cause No. 49D13-0710-CT-042608

March 30, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Maria Espinoza (“Espinoza”) filed a complaint in Marion Superior Court against Rosa Martinez (“Martinez”), Mi Familia Tienda (“Mi Familia”), and Nassirou Gado. Martinez and Mi Familia subsequently filed a motion to dismiss, arguing that the trial court lacked personal jurisdiction over them. The trial court denied the motion to dismiss. Martinez appeals and presents two issues, which we consolidate and restate as whether Espinoza properly gave Martinez service of process which complied with due process.

We affirm.

Facts and Procedural History

Espinoza filed a complaint against Martinez, Mi Familia, and Gado on October 5, 2007, alleging that Gado attacked her while employed by Martinez and Mi Familia.¹ Along with her complaint, Espinoza supplied the court with summonses. On October 16, 2007, the trial court clerk issued, via certified mail, the summonses and a copy of Espinoza’s complaint to Martinez, individually and as Mi Familia’s registered agent. The summonses and complaint were mailed to Martinez at 4018 North High School Road in Indianapolis, the address of the Mi Familia place of business. See Appellant’s App. pp. 11, 48. On November 9, 2007, the trial court clerk certified that summonses and copies of the complaint were returned as “not accepted.” Appellant’s App. pp. 13, 18. The mailing labels on the envelopes sent to Martinez were marked by the Postal Service as follows:

¹ Martinez is the sole principal and agent for Super Mercado Mifamilia, Inc., which is the legal name of the store doing business as Mi Familia Tienda. See Appellant’s App. p. 48.

UNABLE TO FORWARD/FOR REVIEW
C091
NO FORWARDING ORDER ON FILE
RETURN TO POSTMASTER
OF ORIGINAL ADDRESSEE FOR REVIEW

Appellant's App. pp. 15, 19.

According to Espinoza's affidavit, in June of 2008, her counsel requested that she attempt to find Martinez. Espinoza attempted to get the business address of Mi Familia, but stated that she was unable to do so because the store had closed.² She then contacted the mutual friend who had introduced her to Martinez. This person told Espinoza that Martinez attended a church on 34th Street in Indianapolis but lived in Frankfort, Indiana. Espinoza was also informed through other friends that Martinez attended a church near St. Gabriel Church, which is located on 34th Street, but Espinoza was unable to find Martinez through those tips.

On October 9, 2008, Espinoza filed a praecipe and request for service on the Indiana Secretary of State, listing the North High School Road address as Martinez's last known address. See Ind. Trial Rules 4.4, 4.10. On October 10, 2008, the trial court clerk mailed a copy of the complaint and summons to the Secretary of State as the designated agent of Martinez. The trial court clerk noted on October 22, 2008, that this service was accepted by the Secretary of State.

According to Martinez, at some point after October 22, 2008, the insurer for Martinez and Mi Familia learned of Espinoza's lawsuit, and on November 7, 2008,

² The corporation Super Mercado Mifamilia, Inc. was administratively dissolved on December 11, 2008 by the Secretary of State.

counsel for Martinez and Mi Familia entered an appearance for the purpose of challenging the trial court's exercise of personal jurisdiction over them. Martinez and Mi Familia also filed a motion to dismiss the complaint on grounds that the trial court lacked personal jurisdiction over them. The trial court scheduled a hearing on the motion to dismiss for February 23, 2009.

On the morning of February 23, 2009, before the hearing scheduled for that afternoon, Espinoza went to 34th Street yet again to look for Martinez. This time, Espinoza noticed another church, with no name, near St. Gabriel Church. Espinoza went to this church, and a woman there informed her that Martinez and her husband were the pastors at that church. The woman at the church told Espinoza that she would inform Martinez that Espinoza was looking for her. The woman also gave Espinoza business cards from the church. According to the business cards, the name of the church is Centro de Adoracion La Hermosa.³

At 10:30 a.m. that same day, Espinoza's counsel attempted to personally serve Martinez at the 34th Street church. Again, however, Martinez was not there, and Espinoza's counsel left an alias summons and a copy of the complaint with a person identified as the "office manager." Appellee's App. pp. 5-6. This office manager stated he or she would put the alias summons and copy of the complaint in Martinez's office. Id. at 6.

³ The two business cards attached to Espinoza's affidavit are for two different church locations. One card is for "Centro de Adoracion La Hermosa #1" located on 34th Street and lists "Eduardo y Rosa Martinez" as pastors. Appellee's App. p. 4. The other card is for "Centro de Adoracion La Hermosa #2" located on West Washington Street and lists the Martinezes as pastors. Id.

That afternoon, the trial court held a hearing on Martinez's motion to dismiss for lack of personal jurisdiction. Espinoza's counsel filed the alias summons, including a return on service of summons, which indicated that he had given the office manager the alias summons and copy of the complaint. Appellee's App. p. 6. Espinoza filed her affidavit detailing her efforts to locate Martinez. The trial court continued the hearing on the motion to dismiss to March 23, 2009. On March 23, 2009, Martinez filed a supplemental memorandum in support of the motion to dismiss, and the hearing was again continued, by agreement of the parties, to May 1, 2009, "so as to confirm service upon the Defendant, Rosa Martinez." Id. at 11.

On April 1, 2009, an agent for Espinoza's counsel again went to the 34th Street church and attempted to personally serve Martinez. Yet again, however, Martinez was not present at the address. The agent therefore delivered another alias summons and copy of the complaint, this time leaving the documents with a man identified as Martinez's son.

On May 1, 2009, Espinoza filed with the trial court copies of the alias summons and complaint that had been delivered to the 34th Street church on April 1. The trial court held a hearing on Martinez's motion to dismiss that day. The trial court denied the motion to dismiss, finding proper service upon Martinez. On June 1, 2009, Martinez and Mi Familia requested that the trial court certify its order for interlocutory appeal. The trial court granted the request and certified its order for interlocutory appeal on June 4, 2009. We accepted jurisdiction of the interlocutory appeal on August 19, 2009.

Discussion and Decision

Martinez⁴ argues that the trial court erred in denying her motion to dismiss for lack of personal jurisdiction. Martinez does not argue that she lacks sufficient contact with Indiana for the courts of this state to exercise jurisdiction over her and instead bases her argument on the sufficiency of process. A trial court does not acquire personal jurisdiction over a party if service of process is inadequate. Munster v. Groce, 829 N.E.2d 52, 57 (Ind. Ct. App. 2005). Indiana Trial Rule 12(B)(5) allows for dismissal of a complaint if there is insufficient service of process, and Indiana Trial Rule 12(B)(2) allows for dismissal of a complaint if there is a lack of personal jurisdiction. See Munster, 829 N.E.2d at 57. As we recently explained:

When a defendant argues a lack of personal jurisdiction, the plaintiff must present evidence to show that there is personal jurisdiction over the defendant. The defendant ultimately bears the burden of proving the lack of personal jurisdiction by a preponderance of the evidence, unless the lack of jurisdiction is apparent on the face of the complaint. The existence of personal jurisdiction over a defendant is a question of law and a constitutional requirement to rendering a valid judgment, mandated by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Thus, we review a trial court's determination regarding personal jurisdiction de novo. To the extent a trial court may make findings of jurisdictional facts, these findings are reviewed for clear error if they were based on in-court testimony. If, however, only a paper record has been presented to the trial court, we are in as good a position as the trial court to determine the existence of jurisdictional facts and will employ de novo review as to those facts.

Id. at 57.

⁴ For the sake of convenience, our reference to “Martinez” includes her as an individual and as the principal and agent for Mi Familia.

In challenging the trial court's denial of their motion to dismiss, Martinez first argues that Espinoza's attempts to serve process were improper because they occurred beyond the applicable statute of limitations. We disagree.

Indiana Trial Rule 3 provides that a civil action is commenced by filing with the court a complaint, by payment of the prescribed filing fee (or filing an order waiving the filing fee), and, where service of process is necessary, by furnishing to the trial court clerk as many copies of the complaint and summons as are necessary. If a civil action is so commenced within the applicable statute of limitations, the action is timely. See Ray-Hayes v. Heinamann, 760 N.E.2d 172, 174 (Ind. 2002) (holding that civil action was untimely commenced where complaint was filed and filing fee paid within the applicable statute of limitations period but plaintiff did not tender summons to trial court clerk until after the statutory period had expired), modified on reh'g, 768 N.E.2d 899.

Here, there is no dispute that Espinoza tendered her summons when she filed her complaint within the applicable limitations period, and there is no suggestion that she did not pay the applicable filing fee. The action is therefore timely. See Johnson v. Morgan, 871 N.E.2d 1050, 1054 (Ind. Ct. App. 2007) (holding that action was timely where plaintiff tendered a summons to the trial court clerk within the applicable statutory period regardless of whether the summons was actually issued to the correct party).

Martinez argues that service of process was improper because it was never accomplished within the applicable statutory time period. Martinez cites no authority for such a proposition. In fact, the holdings in Ray-Hayes and Johnson suggest quite the opposite. Trial Rule 3 provides that an action is commenced by filing the complaint,

paying the filing fee, and, where necessary, tendering the summons to the trial court. There is no requirement that the summons be delivered to the defendant within the statutory time period. See Johnson, 871 N.E.2d at 1054; Estate of Hunter v. Young, 802 N.E.2d 1015 (Ind. Ct. App. 2004) (civil action was not timely commenced by decedent's estate where complaint was filed within two-year statute of limitations period but summons was not tendered to trial court clerk within limitations period). Moreover, commencement of an action pursuant to Trial Rule 3 tolls the statute of limitations. Geiger & Peters, Inc. v. Am. Fletcher Nat'l Bank, 428 N.E.2d 1279, 1282-83 (Ind. Ct. App. 1981). The proper remedy for a plaintiff's lack of diligence in securing service of process is not dismissal of the action as untimely under the applicable statute of limitations; instead, the proper remedy is a motion to dismiss for failure to prosecute under Trial Rule 41(E). Id. at 1282-83.⁵

Martinez further argues that Espinoza failed to properly comply with the Indiana Trial Rules regarding the service of process. Again, we disagree. When Espinoza first filed her complaint, she attempted to serve the summons and complaint on Martinez by certified mail at Mi Familia's address. This is proper pursuant to Trial Rule 4.1(A)(1), which states that an individual, or an individual acting in a representative capacity, may be served by sending a copy of the summons and complaint by certified or registered mail, with return receipt requested, to the individual's residence or place of business or

⁵ Geiger referred to a prior version of Trial Rule 3 which provided that all that was required to commence a civil action was the filing of the complaint. See 428 N.E.2d at 1281. Although Trial Rule 3 has since been amended to require the payment of the filing fee and tender of the summons to the trial court clerk, this does not affect those portions of the opinion we rely on.

employment. When this mailing was returned as not accepted, Espinoza attempted to locate Martinez through mutual friends and went to a church on 34th Street in an effort to look for her. When this too proved unsuccessful, Espinoza utilized the procedures provided by Trial Rule 4.4 and 4.10.

Trial Rule 4.4 provides in relevant part:

(A) Acts Serving as a Basis for Jurisdiction. Any person or organization that is a nonresident of this state, a resident of this state who has left the state, or a person whose residence is unknown, submits to the jurisdiction of the courts of this state as to any action arising from the following acts committed by him or her or his or her agent:

- (1) doing any business in this state;
- (2) causing personal injury or property damage by an act or omission done within this state;

* * *

- (5) owning, using, or possessing any real property or an interest in real property within this state;

* * *

In addition, a court of this state may exercise jurisdiction on any basis not inconsistent with the Constitutions of this state or the United States.

(B) Manner of service. A person subject to the jurisdiction of the courts of this state under this rule may be served with summons:

- (1) As provided by Rules 4.1 (service on individuals), 4.5 (service upon resident who cannot be found or served within the state), 4.6 (service upon organizations), 4.9 (in rem actions); or
- (2) The person shall be deemed to have appointed the Secretary of State as his agent upon whom service of summons may be made as provided in Rule 4.10.

Martinez's residence was unknown, and Martinez was obviously doing business in Indiana when the claims in Espinoza's complaint allegedly occurred. It therefore appears

that Trial Rule 4.4(B)(2) would permit Martinez to be served via the Secretary of State as provided in Trial Rule 4.10,⁶ which provides in relevant part:

Whenever, under these rules or any statute, service is made upon the Secretary of State or any other governmental organization or officer, as agent for the person being served, service may be made upon such agent as provided in this rule.

- (1) The person seeking service or his attorney shall:
 - (a) submit his request for service upon the agent in the praecipe for summons, and state that the governmental organization or officer is the agent of the person being served;
 - (b) state the address of the person being served as filed and recorded pursuant to a statute or valid agreement, or if no such address is known, then his last known mailing address, and, if no such address is known, then such shall be stated;
 - (c) pay any fee prescribed by statute to be forwarded together with sufficient copies of the summons, affidavit and complaint, to the agent by the clerk of the court.
- (2) Upon receipt thereof the agent shall promptly:
 - (a) send to the person being served a copy of the summons and complaint by registered or certified mail or by other public means by which a written acknowledgment of receipt may be obtained;
 - (b) complete and deliver to the clerk an affidavit showing the date of the mailing, or if there was no mailing, the reason therefor;
 - (c) send to the clerk a copy of the return receipt along with a copy of the summons;
 - (d) file and retain a copy of the return receipt.

Martinez does not claim that Espinoza failed to comply with the technical provisions of this rule. Instead, she claims that Espinoza's service of process via the Secretary of State constituted only constructive notice and that Espinoza has not shown that she exercised due diligence in attempting to give Martinez actual notice, as required by case law and the Due Process Clause of the Fourteenth Amendment. In support of her

⁶ Martinez does not claim that Trial Rule 4.4 and 4.10 are inapplicable to her. She instead claims that Espinoza did not properly serve her pursuant to these rules and that Espinoza did not exercise due diligence in attempting to locate her before using these rules to give her constructive notice.

argument, Martinez relies almost exclusively on the opinion of this court in Munster v. Groce, 829 N.E.2d 52 (Ind. Ct. App. 2005).

In Munster, the plaintiff twice attempted to serve defendant Groce via certified mail, but the mail was returned. Id. at 56. The plaintiff then attempted to serve Groce via the Secretary of State, but the mail was again returned as undeliverable. Id. Later, the other defendant's insurer learned of the lawsuit and filed an appearance on behalf of both defendants. Id. The defendants then moved to dismiss the action against them for lack of personal jurisdiction. Id. The trial court granted the motion to dismiss and denied the plaintiff's subsequent motion to correct error. Id. at 56-57.

On appeal, the court first addressed the issue of personal jurisdiction over Groce. The court first held that Munster had not properly followed the procedures of Trial Rule 4.10.⁷ Id. at 60. The court also held that service via the Secretary of State would, under the circumstances of the case before it, "amount only to constructive service and constructive notice" because Munster had already unsuccessfully attempted to serve Groce via mail and "[h]aving the Secretary of State make the mailing instead was not going to somehow give Groce actual notice of the lawsuit." Id. Unlike Trial Rule 4.13 concerning notice by publication, neither Rule 4.4 or 4.10 require a party seeking service through the Secretary of State to provide an affidavit asserting that due diligence to locate the defendant was unsuccessfully attempted. The court held:

⁷ Munster delivered copies of the complaint and summons directly to the Secretary of State instead of filing a praecipe for the summons with the trial court clerk, and the trial court based its order, at least in part, upon this technical non-compliance with Trial Rule 4.10. Id. at 60.

a plaintiff is required to present evidence of unsuccessful due diligence in locating the defendant, which in turn necessitated the use of constructive notice and service. Otherwise, parties who wished to serve opposing parties whose whereabouts they did not know could always sidestep the due diligence requirements of notice by publication and simply ask for service through the Secretary of State, which is not a proper reading of the Indiana Trial Rules and the Due Process Clause.

Id. at 61.

The Munster court then concluded that the plaintiff had not established such due diligence:

With issues as important as due process, notice of a lawsuit, and personal jurisdiction, we will not presume from the scant evidence in this record that Munster used due diligence in attempting to ascertain Groce's current whereabouts. Harris [an investigator hired by Munster's counsel] provided the following affidavit describing his efforts to serve Groce: "I duly pursued and exhausted all known information to perfect service upon Joe Groce by attempting to deliver to his possession a true copy of the Summons and Complaint in the above-captioned manner at his former places of residence and employment." App. p. 46. Harris also swore elsewhere that he asked the Mikesells [the director of the corporation that was Groce's co-defendant and that director's wife] if they were aware of Groce's current whereabouts. There is no evidence in the record as to what information was used to ascertain Groce's alleged former places of residence and employment. There is no evidence in the record as to any attempts to locate his current whereabouts, aside from asking the Mikesells. There is no evidence in the record that Groce was or is attempting to hide his whereabouts.

Harris' bare-bones affidavit does not permit the conclusion that due diligence was used to locate Groce's current whereabouts, or that service via the Secretary of State, using an address that apparently was known to be invalid, was reasonably calculated to provide Groce notice of this lawsuit. As such, the trial court never obtained personal jurisdiction in a manner consistent with the Due Process Clause. Dismissal of Munster's lawsuit as to [Groce] for lack of personal jurisdiction and insufficient service of process was proper.

Id. at 61-62 (citation and footnote omitted).⁸

Martinez claims that Munster is on point with the facts of the present case and dispositive of the issue on appeal. Espinoza does not claim that Munster is legally incorrect but instead claims that the facts of that case are distinguishable. While we acknowledge that there are several similarities between the present case and Munster, we agree with Espinoza that Munster is distinguishable.

Initially, we note that there is no indication here that the service via the Secretary of State to Martinez was returned as undeliverable, as was the case in Munster.⁹ See id. at 56. We therefore cannot agree with Martinez that Espinoza gave the Secretary of State an address that was known to be invalid as did the plaintiff in Munster. Instead, as set forth in Trial Rule 4.10, Espinoza provided the Secretary of State with the last known address of Martinez. Indeed, and instructive for purposes of assessing Espinoza's diligence, Espinoza's own, first attempt at service at the High School Road address was returned as "not accepted." Further, Espinoza's efforts to locate Martinez went somewhat further than those provided in the "bare bones" affidavit in Munster. Espinoza attempted to obtain a better business address of Mi Familia, but was unable to do so because the store had closed. She then contacted a mutual friend who informed her that Martinez went to a church on 34th Street. Other friends told her that Martinez attended a church near another church located on 34th Street. However, when Espinoza found a

⁸ The Munster court further concluded that Munster had properly obtained service of process over Groce's co-defendant corporation. See id. at 62-64.

⁹ In fact, shortly after the Secretary of State issued the summons, Martinez learned of the suit and filed an appearance, albeit to challenge personal jurisdiction.

church on 34th Street in the area to which she was directed, she was unable to find Martinez.

We also cannot ignore Espinoza's subsequent efforts to locate and personally serve Martinez. Espinoza finally tracked Martinez to the correct church on 34th Street and twice attempted to serve her there, only to find that Martinez was not there at the time. It is important to note that Martinez was represented to be a pastor at the church in question and yet did not respond to two alias summonses and complaints. Under the facts and circumstances presented in the record before us, we conclude that Espinoza did use due diligence in attempting to locate Martinez.

Martinez has not met her burden of demonstrating the trial court's lack of personal jurisdiction over her and Mi Familia. The trial court therefore properly denied Martinez's motion to dismiss.

Affirmed.

BARNES, J., and BROWN, J., concur.