IN THE COURT OF APPEALS OF IOWA

No. 2-178 / 11-1152
Filed March 14, 2012

BRENT A. DIERKS,
Plaintiff-Appellee,

vs.

VENUGOPAL VATSAVAYI, M.D.,
Defendant-Appellant,

and

MERCY MEDICAL CENTER-CLINTON,
INC., and PRABHAKAR PISIPATI, M.D.,
Defendants.

Appeal from the Iowa District Court for Clinton County, David H. Sivright, Jr., Judge.

Venugopal Vatsavayi appeals from the district court's order denying his motion to dismiss for Brent Dierks's failure to timely serve him with the original notice. **AFFIRMED.**

James E. Shipman and Webb L. Wassmer of Simmons, Perrine, Moyer & Bergman, P.L.C., Cedar Rapids, for appellant.

Robert J. McGee of Robert J. McGee, P.C., Clinton, for appellee.

Considered by Vogel, P.J., and Potterfield and Doyle, JJ.

POTTERFIELD, J.

Venugopal Vatsavayi appeals from the district court's order denying his motion to dismiss for failure to timely serve the original notice. The district court found good cause in the actions of third parties for Brent Dierks's failure to serve Vatsavayi within the ninety days required by the Iowa Rules of Civil Procedure. We affirm.

I. Background Facts and Proceedings

On November 22, 2010, Brent Dierks filed a petition against Vatsavayi and co-defendants Mercy Medical Center and Prabhakar Pisipati. Pursuant to Iowa Rule of Civil Procedure 1.302(5), Dierks had ninety days, or until February 20, 2011, to serve the original notice upon the defendants.[1] On December 1, 2010, Dierks requested the sheriff of Clinton County to serve Vatsavayi. On January 6, 2011, the sheriff filed a return of service stating he had been unable to serve Vatsavayi, as he had moved to Louisiana. Dierks apparently never saw the sheriff's diligent search notification and was unaware Vatsavayi had not been served.

In December 2010, both of Vatsavayi's co-defendants filed an answer to Dierks's petition, and each indicated on the answer that a copy had been sent to Vatsavayi's counsel, James Shipman.[2] Dierks and Vatsavayi's co-defendants began discovery procedures, sending medical information and other documents in addition to filing, among other things: a request for production of documents

[1] Because February 20, 2011, was a Sunday, Dierks had until February 21, 2011, to serve the original notice. *See* Iowa Code § 4.1(34) (2009).

[2] James Shipman appeared for Vatsavayi in an earlier filed, related lawsuit. It appears all counsel assumed Shipman would represent Vatsavayi in this suit as well.

and a response thereto; a notice of service of interrogatories to Mercy Medical Center; answers to interrogatories; a motion for summary judgment and resistance to the motion; and a certification pursuant to Iowa Code section 668.11 disclosing expert witnesses. Shipman received a copy of all filings and responses to discovery but did not file anything himself.

The attorneys for the parties exchanged emails to schedule a deposition of Dierks. In response to one of the emails among defense counsel, Shipman replied,

> I don't want to be included, as my client hasn't been served and I'm hopeful he may be dismissed under [Rule 1.302(5)]. Please do not bring this up to Plaintiff's counsel during your call, and if [your staff] would be so kind as to allow you to wait until more than 90 days after suit was filed to hold your call, it would be appreciated.

On March 17, 2011, Vatsavayi filed a motion to dismiss Dierks's petition against him for failure of service. The parties do not dispute that Dierks did not serve Vatsavayi within the ninety days required by the Iowa Rules of Civil Procedure.[3] After a hearing on the matter, the district court denied Vatsavayi's motion to dismiss, finding that "participation in discovery by Dr. Vatsavayi's attorneys is an understandable mitigating circumstance" warranting a finding of good cause for a failure of timely service. Vatsavayi appeals, asserting the district court erred in finding Dierks had established good cause for his failure to timely serve Vatsavayi.

[3] Dierks served Vatsavayi in Louisiana on April 5, 2011, after the ninety days had passed.

II. Standard of Review

We review motions to dismiss for correction of errors at law. *Crall v. Davis*, 714 N.W.2d 616, 619 (Iowa 2006). When considering a motion to dismiss for delay of service, the district court's factual findings are binding if they are supported by substantial evidence. *Id.* Substantial evidence is evidence that "a reasonable mind would accept . . . as adequate to reach a conclusion." *Id.*

III. Good Cause

Iowa Rule of Civil Procedure 1.302(5) provides that if original notice is not served upon the defendant within ninety days after filing the petition, the court "shall dismiss the action without prejudice . . . or direct an alternate time or manner of service." The parties do not dispute that Vatsavayi was not served within ninety days and no order extending the time for service was entered. When there is no service within ninety days and no order extending the time for service, the delay is presumptively abusive. *Id.* at 620. Rule 1.302(5) further provides, "If the party filing the papers shows good cause for the failure of service, the court shall extend the time for service for an appropriate period." Thus, the only issue left to decide is whether Dierks demonstrated good cause for the delay. "Good cause" requires that

> [t]he plaintiff must have taken some affirmative action to effectuate service of process upon the defendant or have been prohibited, through no fault of his [or her] own, from taking such an affirmative action. Inadvertence, neglect, misunderstanding, ignorance of the rule or its burden, or half-hearted attempts at service have generally been waived as insufficient to show good cause.

Wilson v. Ribbens, 678 N.W.2d 417, 421 (Iowa 2004). In defining good cause, our supreme court further stated:

> [g]ood cause is likely . . . 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, the defendant has evaded service of the process or engaged in misleading conduct, the plaintiff has acted diligently in trying to effect service or there are understandable mitigating circumstances . . . .

Id.

We agree with the district court that good cause for the failure of timely service existed. As noted above, good cause is likely to be found when the plaintiff has acted diligently in trying to effect service. We believe the plaintiff acted with the required diligence here. Dierks did take affirmative action to serve Vatsavayi shortly after filing his lawsuit and well within the ninety-day requirement. Dierks provided the sheriff with the original notice for service only nine days after the petition was filed.

Further, the delay in service was only forty-three days, distinguishable from the lengthy and unacceptable more than ninety-day delay in *Meier v. Senecaut*, 641 N.W.2d 532, 542 (Iowa 2002) (no satisfactory explanation given for the more than ninety-day delay in service after learning correct identity of defendant, noting a lapse of time where no service attempts were made and service attempts were made only at home during working hours), and the 184-day delay in *Palmer v. Hofman*, 745 N.W.2d 745, 747 (Iowa Ct. App. 2008) (plaintiff's sole attempt to complete service was the initial delivery of the petition and original notices to the sheriff right after filing and no other action was taken until eight months had passed). Whether or not good cause for delay in service exists must be examined on a case-by-case basis. *See generally Mokhtarian v. GTE Midwest Inc.*, 578 N.W.2d 666, 668 (Iowa 1998) (applying the delay in

service principles and comparing the facts in that case with those in other delay-in-service cases). The length of delay in service must be taken into account, as well as the explanation for the delay. *See Turnbull v. Horan*, 522 N.W.2d 860, 861 (Iowa Ct. App. 1994).

We conclude Dierks has shown good cause for the delay. Though Dierks could have been more diligent in ensuring Vatsavayi had been served, we conclude he pursued a reasonable course of action to effectuate service within ninety days. *See Falada v. Trinity Indus., Inc.*, 642 N.W.2d 247, 249–50 (Iowa 2002) (upholding the district court's decision not to dismiss the case for failure to serve a timely original notice where plaintiff waited until the eighty-ninth day to effectuate service and defendant argued plaintiff could have been more diligent). We affirm the district court's denial of Vatsavayi's motion to dismiss.

AFFIRMED.