IN THE COURT OF APPEALS OF IOWA

No. 2-206 / 11-1240
Filed March 28, 2012

PRISCILLA JOHNSON,
Plaintiff-Appellee,

vs.

U.S. BANK, N.A.,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, David F. Staudt, Judge.

U.S. Bank, N.A. appeals from the district court's order denying its motion to dismiss for Priscilla Johnson's failure to timely serve original notice. **AFFIRMED.**

Chad M. VonKampen of Simmons, Perrine, Moyer & Bergman, P.L.C., Cedar Rapids, for appellant.

Hugh M. Field and Kate B. Mitchell of Beecher, Field, Walker, Morris, Hoffman & Johnson, P.C., Waterloo, for appellee.

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

POTTERFIELD, J.

U.S. Bank, N.A. appeals from the district court's order denying its motion to dismiss for Priscilla Johnson's failure to timely serve original notice. The district court considered the affidavit and correspondence filed in resistance and found the parties had agreed that service would be delayed pending settlement negotiations, providing good cause for the delay. We affirm the district court's finding that Johnson established good cause.

I. Background Facts and Proceedings

On December 3, 2010, Priscilla Johnson filed a petition against U.S. Bank. U.S. Bank had been made aware of the potential lawsuit by a letter from Johnson's counsel, Hugh Field, on July 7, 2009, and subsequent letters in September 2009 giving updates on Johnson's resulting medical procedures. On October 19, 2009, Nathan Herkal, a consultant with a third-party claims administrator for U.S. Bank, sent Field a letter stating, "Our investigation of this incident is complete. Based on the information provided to-date, we are unable to accept the liability for this claim." Herkal gave Field the name and address of the party he felt was liable. Shortly thereafter, on October 30, 2009, Herkal sent Field a letter requesting information from Johnson pursuant to recent changes in reporting requirements for Medicare. The letter stated in part, "We will need this information prior to settlement in order to comply with the new federal requirements."

On June 17, 2010, Field sent a formal settlement demand to Herkal, enclosing a copy of Johnson's medical records and claiming damages in the amount of $125,000.

On December 14, 2010, Field sent Herkal a letter, enclosing the original notice and petition at law that had been filed and explaining,

> We filed this Petition because we were up against the statute of limitations and didn't have any choice. . . . As far as we are concerned, you would not need to obtain counsel and we will give you 20 days notice before you have to have counsel to appear in this case.

Field stated in an affidavit that after receiving the petition, both Herkal and U.S. Bank's attorney[1] requested Johnson's updated medical records. On February 16, 2011, Field sent Herkal a letter enclosing Johnson's medical records and increasing Johnson's settlement demand to $134,837.83.[2] On March 15, 2011, Field's legal assistant emailed Herkal, saying, "We sent a letter to you dated December 14, 2010 with an Original Notice/Petition enclosed. It stated in our letter that you did not have to seek counsel right away and that we would give you 20 days notice to do that if we couldn't come to some agreement." Field stated in his affidavit that his office continued to correspond with Herkal through March 2011 regarding the status of Johnson's claim.

On March 22, 2011, 109 days after she filed her petition, Johnson served her original notice and petition on U.S. Bank. On April 11, 2011, U.S. Bank filed a motion to dismiss based on Johnson's failure to serve original notice within ninety days, as required by the rules of civil procedure. After a hearing on the matter, the district court denied U.S. Bank's motion to dismiss, finding good

[1] U.S. Bank's attorney did not file an appearance until April 11, 2011, when it filed its motion to dismiss.

[2] Field stated in his affidavit that although he sent the medical records to U.S. Bank's attorney, the firm apparently did not receive the records from Field, so he re-sent them on June 9, 2011.

cause in the parties' agreement that Johnson would not serve U.S. Bank while settlement negotiations were pending.

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." When there is no service within ninety days and no order extending the time for service, the delay is presumptively abusive. *Id.* at 620. The parties do not dispute that U.S. Bank was not served within ninety days and no order extending the time for service was entered. 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 Johnson demonstrated good cause for the delay. If there was good cause that prevented Johnson from serving U.S. Bank within ninety days, the court had no discretion except to extend the time for service for an appropriate period. *Id.* If there was no such good cause, the rule requires the court to dismiss the action without prejudice. *Id.*

"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.

The district court noted that in *Wilson*, our supreme court found that an agreement between the parties that service would be delayed, coupled with periodic requests for medical information may constitute good cause under rule 1.302. *Id.* at 422. In *Wilson*, the plaintiff's attorney sent a letter to an insurance claims adjuster acting on behalf of defendant stating, "Pursuant to our agreement, I will not have your insured served with this suit; rather, we will delay serving process in the hopes that we can reach a settlement in this matter." *Id.* at 418–19. The claims adjuster responded, "Per your letter, you are holding off serving the suit papers to my insured to see if we can settle this." *Id.* at 419. In determining that an agreement may constitute good cause, the supreme court noted, "good-faith settlement negotiations standing alone do not constitute good cause for delays in service beyond the ninety-day limit." *Id.* at 422. However, the court held that agreements delaying service in the hope of settlement may constitute good cause under rule 1.302. *Id.* The *Wilson* court further noted that

the "alleged agreement, it is contended, is coupled with the adjuster's periodic requests for medical information," which, "if true, would be highly misleading, and an understandable mitigating circumstance." *Id.*

We find the present case to be similar to *Wilson*. We believe Field's letter and subsequent email to Herkal regarding twenty days' notice were references to service of the original notice, as defendant would be required to obtain counsel and file an answer within twenty days after being served the original notice. *See* Iowa R. Civ. P. 1.303(1) (stating defendant shall serve an answer within twenty days after the service of the original notice and petition). Thus, as in *Wilson*, Field had informed Herkal he intended not to serve original notice until settlement negotiations were complete.

Just as in *Wilson*, Field submitted an affidavit testifying that Herkal requested Johnson's medical records upon receiving Field's letter regarding service. Field also testified by affidavit that Herkal's office corresponded with his office through March 2011. Field's affidavit was unrebutted in both regards.[3]

We believe the district court's finding of good cause is supported by our supreme court's findings in *Wilson*. Herkal was aware Field intended not to serve original notice while settlement negotiations were pending and continued to ask for medical records and correspond with Field. We find this misleading conduct to be a mitigating circumstance in Johnson's favor that is sufficient to establish good cause.

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[3] In its reply in support of its motion to dismiss, U.S. Bank asserted Johnson's resistance, affidavit, and brief should have been struck as untimely because they were filed July 5, 2011, more than ten days after the motion to dismiss was filed. *See* Iowa R. Civ. P. 1.431(4) (stating a party opposing a motion shall file a resistance within ten days after a copy of the motion has been served). This issue was not raised on appeal.

Further, the delay in service was only nineteen days, distinguishable from the longer three month 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). 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 affirm the district court's finding that Johnson established good cause.

AFFIRMED.