

IN THE COURT OF APPEALS OF IOWA

No. 2-495 / 11-0989
Filed July 25, 2012

CINDY CARTER,
Plaintiff-Appellant,

vs.

ELISHER BENJAMIN,
Defendant-Appellee.

Appeal from the Iowa District Court for Scott County, Gary D. McKenrick,
Judge.

A plaintiff appeals a district court order dismissing her petition due to a
delay in serving the defendant with original notice of the lawsuit. **AFFIRMED.**

Michael J. Galvin of Galvin & Galvin, Rock Island, Illinois, for appellant.

Jason P. Butt of Brooks Law Firm, P.C., Davenport, for appellee.

Considered by Vaitheswaran, P.J., and Doyle and Danilson, JJ.

VAITHESWARAN, P.J.

Cindy Carter filed a petition against Elisher Benjamin alleging negligence in the operation of a motor vehicle. She did not have Benjamin served with process until 246 days after the petition was filed. Benjamin moved to dismiss the petition on the ground that Carter lacked good cause for the delay in service. The district court granted the motion and subsequently denied Carter's motion to reconsider. This appeal followed.

Iowa Rule of Civil Procedure 1.302(5) requires dismissal of an action where service of the original notice is not made within ninety days after filing the petition, unless good cause for the failure of service is shown. Good cause means “[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.” *Wilson v. Ribbens*, 678 N.W.2d 417, 421 (Iowa 2004) (citation omitted).

Carter points to the following factors as establishing good cause: (1) her process server attempted service on two separate occasions, (2) her process server was told that Benjamin did not live at the address where service was attempted, and (3) “[i]mplicit” in her communications with Benjamin's insurer “was an agreement not to continue attempts to serve Mr. Benjamin while negotiations and acquisition of medical records were ongoing.” Our review is for errors of law and we are bound by the district court's factual findings if “supported by substantial evidence.” *Id.* at 418.

We begin with the effect of Carter's initial attempts at service. “[H]alf-hearted attempts at service have generally been waived as insufficient to show

good cause.” *Id.* at 421 (citation omitted). On the other hand, good 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. (citation omitted).

The district court determined that the attempts at service did not amount to good cause for the delay. That determination is supported by substantial evidence. Benjamin attested that he lived at the same address at all times, he never attempted to evade service, and he was unaware of the two initial attempts to serve him. Carter did not refute these attestations. She also conceded that a third attempt at service was not made until approximately eight months after the petition was filed. This time, a card was left in Benjamin’s mailbox requesting that he contact the sheriff’s office to pick up the complaint and original notice. Benjamin complied with the request, lending credence to his assertion that he had no intent to evade service.

We turn to Carter’s assertion that, when the process server made his two attempts at service, he was told Benjamin did not live at the address. The district court did not make a finding concerning the effect of this fact on its good cause determination, but we will assume the court considered it in determining that the first two attempts at service did not amount to good cause. *See Hubby v. State*, 331 N.W.2d 690, 695 (Iowa 1983) (noting that findings of fact “are given a liberal

construction favorable to the judgment” and assuming “as fact an unstated finding that [was] necessary to support the judgment”).

The record does not reveal who made this statement, and there is no evidence to suggest it was made to throw Carter off Benjamin’s scent. In any event, Carter failed to research the truth or falsity of this statement until almost eight months later. Based on this record, we conclude the court’s implicit finding is supported by substantial evidence.

The district court also rejected Carter’s reliance on what she characterizes as an implicit agreement with the insurer to delay service. The court found that the correspondence with the insurer did not reflect such an agreement and concluded that ongoing settlement discussions do not amount to good cause.

The court’s finding that the correspondence did not contain an agreement to delay service is supported by substantial evidence. A letter from the insurer stated,

I have been assigned to handle Ms. Carter’s case.
Please let me know if you are prepared to forward a demand
so we can move forward with negotiations.
Otherwise, I will wait to receive notice of service on our
insured and proceed with assignment of defense counsel.

Later, the insurer wrote, “In response to your demand for Ms. Carter’s case, I am requesting you proceed with service on my insured before we enter into any negotiations.” While the insurer’s use of the term “[o]therwise” in the first letter could have caused some confusion, there is no indication that Carter made efforts to clear up that confusion. In any event, it is established that “good-faith settlement negotiations standing alone do not constitute good cause for delays in service beyond the ninety-day limit.” *Wilson*, 678 N.W.2d at 422; accord *Antolik*

v. McMahon, 744 N.W.2d 82, 85 (Iowa 2007) (“[S]ettlement negotiations, even if done in good faith, do not constitute adequate justification or good cause for delaying service.” (citation omitted)). For that reason, the district court did not err in discounting this argument.

We affirm the district court’s dismissal of Carter’s petition.

AFFIRMED.