IN THE COURT OF APPEALS OF IOWA

No. 8-799 / 08-0648
Filed October 29, 2008

ARTHUR L. WATTERS,
Plaintiff-Appellant,

vs.

SUSAN M. LIDTKE,
Defendant-Appellee.

JOHN W. WATTERS,
Plaintiff-Appellant,

vs.

SUSAN M. LIDTKE,
Defendant-Appellee.

Appeal from the Iowa District Court for Pottawattamie County, Charles L. Smith III, Judge.

Arthur Watters and John Watters appeal from the district court order dismissing their negligence claim against Susan Lidtke for delay of service. **AFFIRMED.**

Richard D. Crotty, Council Bluffs, and Terry Anderson, Omaha, Nebraska, for appellant.

Dennis M. Gray and Sarah J. Stilwill of Peters Law Firm, P.C., Council Bluffs, for appellee.

Considered by Huitink, P.J., and Vogel and Eisenhauer, JJ.

EISENHAUER, J.

Arthur Watters and John Watters appeal from the district court order dismissing their negligence claims against Susan Lidtke for delay of service. They contend the failure to serve Lidtke within the ninety days required in Iowa Rule of Civil Procedure 1.302(5) should be excused for good cause. We review the court's ruling on a motion to dismiss for errors at law. Iowa R. App. P. 6.4. 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. *Crall v. Davis*, 714 N.W.2d 616, 619 (Iowa 2006).

The plaintiffs were in an automobile accident on November 15, 2005. On October 16, 2007, they filed separate suits against Lidtke for injuries sustained from the accident. On October 22, 2007, the plaintiffs sent a request to the Mills County Sherriff to serve Lidtke. An unsuccessful attempt to serve Lidtke was made on December 4, 2007, and on December 20, 2007, the sheriff sent the plaintiffs a "Return of Service" which stated he was unable to locate Lidtke. The sheriff also provided a Springfield, Illinois post office box number for Lidtke.

The ninety-day time period for service expired on January 14, 2008. On the same date, the plaintiffs mailed the petition and notice to the sheriff for Springfield, Illinois. They later called the sheriff's office and learned personal service could not be accomplished upon a post office box. The plaintiffs attempted to learn Lidtke's address through the telephone book and directory assistance, but were unsuccessful. The plaintiffs filed separate motions for extension of time after the expiration of the ninety-day deadline. Alternate

service was obtained on John Watters's petition on February 18, 2008, when the Secretary of State was served. Arthur Watters likewise obtained service on March 5, 2008.

On February 20, 2008, Lidtke filed a motion to dismiss, stating the plaintiffs failed to serve her within ninety days and no good cause exists for the delay in service. In separate orders as to each plaintiff, the district court granted the motion March 14, 2008.

Once a petition is filed with the district court, the plaintiff must serve the defendant with notice of the pending action within ninety days. Iowa R. Civ. P. 1.302(5). Service of process made after ninety days is presumptively abusive and a plaintiff must show good cause for the delay in service in order to avoid dismissal. Iowa R. Civ. P. 1.302; *Crall*, 714 N.W.2d at 619-20 (citing *Meier v. Senecaut*, 641 N.W.2d 532, 541 (Iowa 2002)). When, as here, there is no service within ninety days and no order extending time for service, the only issue is whether the plaintiffs have "shown justification for the delay." *Crall*, 714 N.W.2d at 620 ("If there was no such good cause, the rule required the court to dismiss the action without prejudice"). In order to show good cause,

> [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 [deemed] insufficient to show good cause.

Id. (quoting *Meier*, 641 N.W.2d at 542). Additionally, good cause is generally found when the plaintiff has acted diligently and service is delayed as "a result of

the conduct of a third person, typically the process server," or the defendant has evaded service or engaged in misleading conduct. *Wilson v. Ribbens*, 678 N.W.2d 417, 421 (Iowa 2004).

In ruling on Lidtke's motion to dismiss, the district court stated:

> Here, Plaintiff has failed to show good cause for the delay in service. Plaintiff has not alleged that Defendant evaded service or that the delay was the result of error on the part of the process server. Plaintiff's only explanation as to why he did not serve Defendant is that Defendant moved to Illinois. When Defendant moved to Illinois, Plaintiff had alternative methods for service available to him, yet made no attempt to use any of these methods within the ninety-day window. . . .
>
> Plaintiff attempted none of these relatively inexpensive, easy methods of service in order to serve Defendant. Plaintiff chose only to send the petition and notice to the sheriff in Illinois, without speaking with the Illinois sheriff first. While mailing the petition to two sheriffs and calling directory assistance may be affirmative steps on Plaintiff's part, they do not constitute good cause. These steps establish a pattern of half-hearted attempts at service. Plaintiff's efforts were not "meaningful attempt[s] to locate or serve the defendant." Therefore, this Court finds that Plaintiff's attempts do not constitute good cause and that the delay in service is unjustified.

(Citation omitted.) The court also found the motion to extend time for service did not prevent it from dismissing the case because the extension was requested after the ninety-day deadline had expired, the court made no finding of good cause for the extension, and the order was entered without notice to Lidtke.

The district court found the plaintiffs' attempts at service, although affirmative, to be half-hearted. It notes the plaintiffs had the opportunity to use alternative means of serving Lidtke within the ninety days and failed to do so, even though they resorted to alternative service after the expiration of the time limit. Additionally, the plaintiffs' action in mailing the petition and original notice to

the Illinois sheriff without first attempting to find out if service was possible indicates a disinterest in whether service would be effectuated. We conclude the district court order did not err in dismissing the plaintiffs' petition. Accordingly, we affirm.

AFFIRMED.